TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted] 396

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, ILLINOIS CENTRAL RAILROAD COMPANY, AND LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLANTS,

vs.

THE STATE OF TENNESSEE, B. A. ENLOE, HARVEY H. HANNAH, JULIAN H. CAMPBELL, MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, ET AL., &c.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED MAY 23, 1922.

(28,943)

(28,943)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 988.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, ILLINOIS CENTRAL RAILROAD COMPANY, AND LOUISVILLE & NASHVLLE RAILROAD COMPANY, APPELLANTS,

vs.

THE STATE OF TENNESSEE, B. A. ENLOE, HARVEY H. HANNAH, JULIAN H. CAMPBELL, MEMBERS OF AND CONSTITUTING THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF THE STATE OF TENNESSEE, ET AL., &c.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

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In the District Court of the United States for the Middle District of Tennessee, Nashville Division.

In Equity.

No. 88.

HE STATE OF TENNESSEE, THE RAILROAD AND PUBLIC UTILITIES Commission of Tennessee, and The State of Tennessee on Relation of the Railroad and Public Utilities Commission of Tennessee,

versus

THE UNITED STATES.

TRANSCRIPT OF RECORD.

Original Petition.

(Filed October 21, 1921.)

To the Honorable Judges of the United States District Court for the Middle District of Tennessee, Nashville Division, Sitting in Equity:

Petitioners file this, their original petition, against the Respondent, he United States, and show to the Court as follows:

I.

Petitioners, the Railroad and Public Utilities Commission of the tate of Tennessee, composed as stated in the caption hereof, constitute the administrative agency of the State of Tennessee, empowered under the authority of Chapter 10 of the Acts of the General ssembly of Tennessee of 1897, and Acts amendatory thereof, to supervise and fix the rates, charges and regulations of railroads in Tenessee, and to correct abuses and prevent unjust discrimination and xtortion in the rates of freight and passenger tariffs on the different ailroads operating in Tennessee; and charged by said legislative ct with the duty of taking any and all necessary steps to enforce he provisions of said act and to see that all such laws of the State f Tennessee concerning railroads are enforced and obeyed, and hat violations thereof are promptly prosecuted, etc.

The Petitioner, the State of Tennessee, by and through its duly ppointed and commissioned officers, and by and through its several overnmental subdivisions, counties and municipalities, has been engaged, is now engaged, and will continue to be engaged in the construction, repair and maintenance of public highways through its erritorial boundaries; in the construction and maintenance of some

of which highways and roads, the Petitioner, the State of Tennessee, is acting jointly with its several counties, as governmental subdivisions, and with the Government of the United States, the expenses of which joint highway*d*s is being borne out of the public revenues of the Petitioner, the State of Tennessee, its several counties, and the United States Government.

2 II.

This suit, being of a civil nature, brought in equity, is instituted to enjoin, set aside, annul and suspend, in whole or in part, as the Court may decree, an order of the Interstate Commerce Commission requiring railroads in Tennessee to establish and maintain a schedule of rates and tariffs on intrastate shipments of certain commodities which rates and tariffs are higher in a substantial degree than the rates and tariffs permitted to be charged on intrastate shipments of such commodities by the orders duly made by the Petitioner, the Railroad and Public Utilities Commission.

The order of the Interstate Commerce Commission, to enjoin, annul and suspend which this suit is brought, was made by the Interstate Commerce Commission upon the petition of ten railroad companies doing business in Tennessee, one of which was the Nashville, Chattanooga & St. Louis R*a*ilway, a corporation chartered under the laws of the State of Tennessee, and having and maintaining its principal office, situs and residence in Nashville, Davidson County, Tennessee, within the jurisdiction of this Court, the Middle District of Tennessee, Nashville Division.

In the petition of the Nashville, Chattanooga & St. Louis Railway, and other railroads, filed before the Interstate Commerce Commission, upon which the said order was made, it was prayed that said order be made "after due notice has been given to the State of Tennessee and the authorities thereof." Such notice was given Petitioner, the State of Tennessee, and said Petitioner made its appearance as a party in interest before the Interstate Commerce Commission, resisting the said petition, and protesting against the making of said order, its appearance being made through its administrative agent, the Railroad and Public Utilities Commission. Said Ralroad and Public Utilities Commission of Tennessee was present by its agent at the taking of proof in the investigation ordered by the Interstate Commerce Commission pursuant to said petition, and, after the investigation was completed, filed its brief before the Interstate Commerce Commission, protesting against the making of said order of
3 the Interstate Commerce Commission; all of which, as Petitioners are advised, rendered the Petitioners herein parties in interest to the proceedings before the Interstate Commerce Commission, entitling them and each of them to bring this suit.

Petitioner, the State of Tennessee, in its own name and treasury, and in its various governmental subdivisions, as well as the Respondent, the United States Government, are injuriously affected by said order of the Interstate Commerce Commission, in that its enforcement will require the payment from the treasury of the State of Tennessee,

its various governmental subdivisions, and from the treasury of the United States, large sums of money in freight charges on materials purchased by them, used in the construction of public roads and highways in Tennessee, greatly in excess of the amounts they would be required to pay for such freight rates, but for the making and enforcement of said order of the Interstate Commerce Commission; which fact further entitled the Petitioner, the State of Tennessee, to institute and maintain this suit.

III.

On July 20, 1920, the Interstate Commerce Commission, by an order known and referred to as its order in Ex Parte 74, authorized interstate railroads operating in and through the State of Tennessee to increase their freight transportation rates, switching charges and other charges, twenty five per cent, and, pursuant to said order of the Interstate Commerce Commission, the several railroads referred to put into effect a general increase in their interstate transportation rates, on interstate shipments originating and terminating in the State of Tennessee to the extent authorized by said order. Subsequently, in September, 1920, the several railroads carrying on intrastate freight and passenger traffic in Tennessee, promulgated proportionate advances in their intrastate transportation rates in Tennessee, which increases were suspended by the Railroad and Public Utilities Commission of Tennessee, acting within its statutory authority and power.

After various intermediate steps and orders had been taken, which are not now material, the Railroad and Public Utilities Commission of Tennessee finally, on November 19, 1920 after hearing evidence and argument concerning the proposed advance in intrastate rates, made and issued its order, a certified copy of which is filed herewith,
as Exhibit "A" to this petition. By this order, the several
4 railroads in Tennessee were authorized to increase certain
of their intrastate freight rates in amounts proportionate to the increases in interstate rates authorized by the order of the Interstate Commerce Commission in Ex Parte 74, but further providing as follows:

"It is further ordered, That respondents hereto shall make no advances in their rates on intrastate shipments of sewer pipe (earthen, clay or concrete) car load, over and above the rates on said commodities as in effect immediately prior to the date of this original suspension, and

"It is further ordered, That on car load shipments of stone and gravel moving intrastate between points in Tennessee, when for use in building public highways and consigned to Federal, State, County or Municipal authorities, or their bonafide agents, that carriers respondent thereto shall make no advance in the rates and charges over and above those in effect immediately prior to the effective date of the original suspension on these commodities, and

"It is further ordered, That this order shall continue in effect for a period of not less than two years from date when it shall take effect, unless otherwise ordered by this Commission."

The Nashville, Chattanooga & St. Louis Railway, and other railroad companies doing business in Tennessee, then filed their petition, dated December 23, 1920, before the Interstate Commerce Commission, averring that said order of the Railroad and Public Utilities Commission of Tennessee, and especially those parts thereof hereinabove quoted, created an undue burden upon interstate commerce, by unduly and unjustly preferring shippers and localities in Tennessee against shippers and localities in other states, and further, by denying to the Petitioners before the Interstate Commerce Commission many thousands of dollars of revenue which they were entitled to receive and collect, under the Transportation Act of Congress 1920. The prayer of said petition before the Interstate Commerce Commission was as follows:

"Wherefore, your petitioners pray on their own behalf and on behalf of all other railroads operating in the State of Tennessee that this Honorable Commission will institute at an early date an investigation with respect to the matters and things herein set forth; and after due notice has been given to the State of Tennessee and the authorities thereof, an order be entered declaring discriminatory prejudicial, unjust and unlawful, and as creating an undue burden upon interstate commerce, any rate, fare or charge required to be observed by order of The Railroad and Public Utilities Commission of the State of Tennessee, or other authority of said State, for an- in connection with the intrastate transportation of freight traffic within the State of Tennessee (and including particularly the rates on sewer pipe, earthen, clay or concrete, carloads; stone and gravel, carload—when for use in building public highways and consigned to Federal, State, County or Municipal authorities, or their bona fide agents; and on common brick), which is less than the rates, fares and charges that would result from percentage increases corresponding with the increases in rates, fares and charges applicable for like or similar service in interstate transportation that have heretofore been authorized and made effective for carriers in the Southern Group under and in pursuance of the decision of this Commission in Ex Parte 74; and that this Commission by its order will prohibit such advantage, preference and prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce on the other hand, and such unjust discrimination against interstate commerce and unlawful burden upon interstate commerce, and will prescribe the rates, fares and charges, or the maximum and minimum, or the maximum or minimum, thereafter to be charged, and the classifications regulations and practices thereafter to be observed, for an- in connection with the intrastate transportation of freight traffic within the State of Tennessee, in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination aforesaid.

And petitioners pray for such other and further general relief in the premises as to this Commission may seem right and proper."

After investigation and upon consideration of briefs filed by petitioners in that proceeding and by the petitioners herein acting as protestants in said proceeding before the Interstate Commerce Commission, the said Commission announced its findings, as being that the intrastate rates on common brick and sewer pipe, in car loads, between points in Tennessee, were not shown to cause any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and in interstate or foreign commerce, on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce.

With regard to the intrastate rates on the transportation of stone and gravel, in car load shipments, the Interstate Commerce Commission declared its findings to be as follows:

"We further find that the increases made by respondents in their interstate rates for the transportation of stone and gravel, in car loads, under our decision relating to the southern group in Ex Parte 74, result in reasonable charges for the interstate transportation of those commodities between points in Tennessee and points in adjoining states and that the failure of said respondents within the state of Tennessee correspondingly to increase their intrastate rates and charges for the transportation of stone and gravel when used in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, in force on the date of our decision in Ex Parte 74, has resulted in the past and will result in the future in lower rates on those commodities than the corresponding interstate rates between points in Tennessee and points in adjoining states and in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining states; in undue preference to persons and localities in Tennessee; and in unjust discrimination against interstate commerce.

6 We find *find* that said undue prejudice, preference, and discrimination can and should be removed by making increases in the intrastate rates for the transportation of stone and gravel, in car loads, when for use in the construction of public highway*ds* and consigned to federal, state, county, or municipal authorities or their bona fide agents, in force on the date of our decision in Ex Parte 74, which shall correspond with the increases heretofore made and now in effect as aforesaid in the interstate rates for the transportation of said commodities shipped in interstate commerce between points in Tennessee and points in adjoining states.

These findings are without prejudice to the right of the authorities of the State of Tennessee or of any other party in interest to apply in the proper manner for a modification of our findings and order as to any specific intrastate rate or rates for the transportation of the commodities named on the ground that the latter are not

related to the interstate rate or rates in such a way as to contraven
the provisions of the interstate commerce act.

Schedules giving effect to these findings may be made effective o
not less than five days' notice.

"An appropriate order will be entered."

Pursuant to said findings, on August 3, 1921, at a general sessio
of the Interstate Commerce Commission, held at its office in Was
ington, D. C., an order was entered, identified on the docket of sa
Commission as No. 12132, providing that all common carriers b
steam railroad operating in Tennessee, naming them, including th
Nashville, Chattanooga & St. Louis Railway, should cease and d
sist from practicing the undue prejudice, undue preference and a
vantage, and unjust discrimination, found to exist as stated in th
quotation hereinabove made from the findings of the said Commi
sion, in the relation of interstate rates for the transportation of sto
and gravel, in car loads, when for use in the construction of publ
highways and consigned to federal, state, county, or municipal a
thorities, or their bona fide agents. This order further provides th
all said railroad companies are required to "establish, put in for
and maintain" rates for the transportation of such commodities i
intrastate commerce within the State of Tennessee which shall e
ceed the rates for the transportation of said commodities in effe
July 29, 1920, in amounts corresponding to the increases heretofo
made and now in effect under the order of the Interstate Commer
Commission referred to as Ex Parte 74, in the rates for the transpo
tation of said commodities in interstate commerce within the Sta
of Tennessee and between points in the State of Tennessee and poin
in adjoining states.

The order further provides that it shall become effective o
7 or before October 13, 1921, upon notice to the Commissi
and to the general public by not less than five days' noti
filed and posted in the manner prescribed in Section 6 of the Inte
state Commerce Act, and "remain in force until the further order
the Commission in the premises."

A complete copy of the finding of the Interstate Commerce Co
mission in said proceeding and of the order made thereon by sa
Commission, will be filed in this cause before the hearing, as Exhib
"B" to this petition.

The several carriers and railroad companies operating in Te
nessee named in and affected by said order of the Interstate Co
merce Commission, have given the notice described in th- last pa
of said order, that the increased schedule of rates required by sa
order will be put into effect and maintained by them on and aft
September 23, 1921; and Petitioners aver that unless said order
the Interstate Commerce Commission, in whole or in part, is e
joined, set aside, vacated or annulled by the proper decree of th
court, said increased rates will be charged by said railroads an- t
Petitioners, and the United States Government, and other shippe
will be required to pay the increased rates on shipments of sto
and gravel, in carload lots, purchased and owned by Petitioner, t

State of Tennessee, and its governmental subdivisions, and by the Government of the United States, for use in the construction and maintenance of the public highways in Tennessee.

IV.

Petitioners charge and aver that in making and requiring the enforcement of said order, the Interstate Commerce Commission exceed the authority and power vested in said Commission by Congress, and that to the extent the said Commission exceeded its said authority and power, its order is null and void and should be so adjudged and decreed by this Court; and this averment is made by the Petitioners especially in so far as said order of the Interstate Commerce Commission affects and is applied to shipments of stone and gravel in car load lots which are the property of the State of Tennessee, or the several counties and municipalities thereof, and of the United States Government, whether said stone and gravel
8 be the property of the state or one of its subdivisions alone, or the property of the State of Tennessee and the Government of the United States jointly, purchased and acquired in the construction and maintenance of the several highways which are being constructed and which will be constructed by the State of Tennessee and the Government of the United States jointly.

Petitioners aver that the Interstate Commerce Commission has no power or authority to order and direct any increase of the rates on purely intrastate shipments and transportation of any commodity, except under and pursuant to the power vested in said Commission by Congress to remove unjust discrimination and undue and unreasonable preference or advantage in interstate commerce, prohibited by Sections 2 and 3 of the Act of Congress, known as the Interstate Commerce Act; and Petitioners aver that Congress, by the provisions of Section 22 of the Interstate Commerce Act, has exempted from the provisions of said Sections 2 and 3 of said Act the carriage, storage or handling of property of the United States, state or municipal governments, the power and control of the Interstate Commerce Commission over such shipments being limited to the prevention of unreasonably high rates for transportation in interstate commerce of the property of such governments.

Said Section 22 of the Interstate Commerce Act, provides as follows:

"That nothing in this Act shall prevent the carriage, storage or handling of property free or at reduced rates—for the United States, state or municipal governments."

This section of the Interstate Commerce Act has been declared by the Supreme Court of the United States to "settle beyond all doubt that the discrimination in favor of certain persons therein named, should not be deemed unjust." It is also true, as Petitioners aver, that any preference or advantage which may result to shippers or localities from the application of said Section 22 to interstate com-

merce, is not "unjust or unreasonable" preference or advantage, and is not therefore unlawful.

In construing and administering the provisions of Section 22 of the Interstate Commerce Act, in connection with the other provisions of the Act, the Interstate Commerce Commission, in its "Con-
9 ference Rulings," issued in "Bulletin No. 7," on November 1, 1917, by order of the Commission, provided as follows:

"33. Reduced Rate Transpor-ation for Federal, State and Municipal Governments.* Under Section 22 of the Act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for state or municipal governments, under arrangements made directly with such government, and in which no contractor or other third person intervenes, without filing or posting the schedule of such rates with the Commission. (See rulings 36, 308*e*, 218, 244, 311 and 452.)"

"36. Rates on Shipments for the Federal Government. If title to property such as postal cards, passes to the government at the point of manufacture, the carrier may agree upon a rate to be applied for transporting it for the government to another point, without filing a tariff with the Commission. But if the manufacturer under his contract is required to deliver to the government at such other point, the transportation must be under the published tariff rate. In other words, if the shipment is made directly by the government, this rate may be fixed by the carrier without posting and filing the tariff, but not otherwise. (See ruling 33, and ruling 244 rescinding ruling 65; also see ruling 452; also United States v. A. & V. Ry. Co., 40 I. C. C., 406.)"

"208 (*e*). Section 22 of the act authorizes carriers to grant free or reduced rate transportation of property for the United States, state, or municipal governments, or for charitable purposes *of* for exhibition at fairs or expositions. It also authorizes free or reduced fare transportation of certain specified persons. These special provisions and the words 'reduced rates' are construed to be special authority for carriers to depart from established tariff rates or fares; and for such transportation as is provided for in said section 22 it is not necessary for carriers to provide tariffs or observe tariff rates or fares and regulations excepting in the issuance, sale, and use of mileage, excursion, or commutation passenger tickets, and joint interchangeable mileage tickets. As to these, the provisions of section 6 with regard to publishing, filing, posting and observing tariffs must be complied with."

Petitioners aver that the effect of th-se Conference Rulings by the Interstate Commerce Commission is to expressly authorize discrimination and preferenc- in interstate commerce in the transportation of the property of the United States, or state or municipal governments, under the authority of Section 22 of the Interstate Commerce Act, in that the several carriers in interstate commerce are authorized thereby to enter into secret and private contracts and arrangements with the

governmental and municipal shippers for the transportation of governmental and municipal property with no notice to the Interstate Commerce Commission of such private and secret arrangements and terms; and in that the several carriers are further authorized, in making such private and secret arrangements with governmental and municipal shippers, to depart from established and published tariff rates on file with the Interstate Commerce Commission, in
10 instances where the carriers affected do not elect to accept the invitation and permission of the Interstate Commerce Commission to withhold their tariffs and rates on such transportation from the files and knowledge of the Interstate Commerce Commission.

Petitioners aver that said Conference Rulings are manifestly authorized by said Section 22 of the Interstate Commerce Act, and are wholly inconsistent with any power and authority in the Interstate Commerce Commission to prevent discrimination and preference or advantage between Governmental shippers, or between localities from and to which shipments of governmental property are made.

Petitioners aver that the effect of said Conference Rulings is to deprive the Interstate Commerce Commission of all means of determining the existence of preference and discrimination in such shipments.

Petitioners further aver that in authorizing the carriage of governmental property free, or at reduced rates, in said Section 22 of the Interstate Commerce Act Congress expressly authorized carriers to make preferences in such shipments, and declared that such preference is not unlawful preference or unlawful discrimination as defined in Sections 2 and 3 of the Interstate Commerce Act.

Petitioners aver that the property of a municipal or state government cannot be carried by a railroad company free, or at reduced rates, without granting to such municipality, or to the locality from which the shipment is made, a preference and advantage which, if done with respect to any other kind of shipment, would be an unjust and unreasonable preference within the prohibition of Sections 2 and 3 of the Interstate Commerce Act; Petitioners aver that by said Section 22, Congress intended to exempt such preference and advantage in transportation of governmental property from the prohibition contained in Sections 2 and 3 of said Act.

Petitioners further aver that in making its said order, requiring railroad companies in Tennessee to "establish and maintain" rates on intrastate shipments of stone and gravel at the increased level, the Interstate Commerce Commission has placed intrastate shippers at an unjust and unreasonable disadvantage which Congress did not contemplate or authorize, in that while requiring the
11 maintenance of this intrastate rates in question, at the level fixed by the Interstate Commerce Commission, done for the purpose of making said intrastate rates properly proportionate to interstate rates, the Interstate Commerce Commission is powerless to require the maintenance of the interstate rates on such shipments, and has, by its Conference Rulings referred to, made it im-

possible for it, or any other governmental agent, to ascertain or determine whether the said interstate rates are being maintained on shipments of governmental property, or whether reduced rates are granted to governmental shippers in interstate commerce, to the prejudice and injury of governmental shippers in Tennessee.

Petitioners further aver that the order of the Interstate Commerce Commission under such circumstances and conditions, constitutes an unwarranted and unauthorized interference with the reserved powers of the State of Tennessee, acting through its Railroad and Public Utilities Commission, in the control of purely intrastate transportation by common carriers, since it prevents the said Railroad and Public Utilities Commission of Tennessee from making a rate for the transportation of governmental property in Tennessee which it finds to be a reasonable rate for such transportation, simply because the same carriers, and other carriers, have filed with the Interstate Commerce Commission a schedule or schedules of rates on interstate shipments of governmental property from adjoining states to points in Tennessee, which are proportionately higher than the intrastate rates found by the Tennessee Railroad and Public Utilities Commission to be reasonable, when the interstate carriers are not required by the Act of Congress, nor by the rulings of the Interstate Commerce Commission to adhere to or maintain the published schedules of rates, but are authorized both by the Act of Congress and by the rulings of the Interstate Commerce Commission to enter into secret and private agreements for the transportation of such property in interstate commerce without notice to the Interstate Commerce Commission or any other governmental agency.

Petitioners aver that the true and proper construction of Section 22 of the Interstate Commerce act is that preference and discrimination in the transportation of governmental property in interstate commerce is not unjust discrimination and not undue or
12 unreasonable preference, and such discrimination and preference are therefore not unlawful. Petitioners aver that under this construction of Section 22 of the Interstate Commerce Act, the Interstate Commerce Commission is not authorized or empowered to order and require carriers to cease and desist from practicing prejudice, preference and discrimination in the transportation of governmental property in interstate commerce, and is therefore not empowered and authorized to require intrastate carriers to increase their rates on intrastate shipments of governmental property on the ground that such rates constitute an undue preference in favor of intrastate shippers and an unjust discrimination against shippers in adjoining states.

V.

Premises considered, Petitioners pray the judgment and decree of this Court that the said order of the Interstate Commerce Commission No. 12132, in so far as it requires steam railroads in Tennessee to establish, put in force and maintain any increase in their

ıtes for the transportaion of stone and gravel, in carloads, when
ɔr use in the construction of public highwayds and consigned to
ederal, state, county or municipal authorities, or their bona fide
gents, shich will exceed the rates of said railroads for the transpor-
ation of said commodities in effect July 29, 1920, when said com-
ıodities are carried and transported for the United States, State, or
ıunicipal governments, be declared to be null and void as in excess
f the power and authority conferred upon the Interstate Commerce
ommission by Congress, and that said order, to said extent, be en-
ɔined, set aside, annulled and suspended; and that said order be
eclared by final decree to be valid and binding upon no one from
ıe date of its promulgation and publication by the Interstate Com-
ıerce Commission.

And Petitioners pray that they be granted such other and further
elief which may be just and equitable and to which they may be
entitled in the premises.

3 This is the first application for writ of injunction on said order.

And Petitioners pray that service of this petition on the United
tates be made by filing a copy hereof in the office of the Secretary
f the Interstate Commerce Commission and in the Department of
ustice. The oath to any answer filed to this petition is waived.

And Petitioners further pray that upon the filing of answer
ereto by the United States, or upon the failure to file such answer,
t the expiration of thirty days from the filing of said copies, an
rder be entered expediting the case and assigning it for hearing
t the earliest practicable date, in the manner required by the Act
f Congress under which this suit is filed.

FRANK M. THOMPSON,
Attorney General & Report- of Tennessee.
WM H. SWIGGART, JR.,
Assistant Attorney General & Reporter of Tennessee.

TATE OF TENNESSEE,
County of Davidson:

Personally appeared before me, a Notary Public in and for David-
ɔn County, Tennessee, authorized by law to take affidavits A. A.
'aylor, who made oath in due form that he is the Governor of the
tate of Tennessee, vested by the Constitution of Tennessee with
he supreme executive power of the State; that he is familiar with
he matters and things set forth in the -oregoing bill of complaint
nd that the averments contained therein so far as they are positive
verments of fact are true, and in so far as they sonsist of averments
ıade upon information and belief, he verily believes them to be
rue; and that in so far as said averments consist of statements
nd conclusions of law, he verily believes them to be true.

A. A. TAYLOR.

Sworn to and subscribed before me this 20 day of September 1921.

[SEAL.] LENA H. BROWN,
Notary Public.

14 EXHIBIT A.

Office of the Railroad and Public Utilities Commission.

Nashville, November 19, 1920.

Investigation and Suspension Docket, No. 43.

In re advanced rates and charges on car load shipments of road building material (when consigned to and for Federal, State county or municipal authorities or their bona fide agents), sand gravel, brick, sewer pipe, fertilizer, and fertilizer material between stations in Tennessee when moving over the rails of the following carriers: Carolina, Clinchfield & Ohio Ry. Southern Ry. System, Nashville, Chattanooga & St. Louis Ry., Louisville & Nashville Railroad, Mobile & Ohio Railroad, Illinois Central Railroad, Chicago, Memphis & Gulf Railroad, East Tennessee & Western North Carolina Railroad, Harriman & Northeastern Railroad Tennessee & North Carolina Railroad.

Appearances:

Louisville & Nashville R. R. and Nashville, Chattanooga & St Louis Ry.—W. A. Northcutt.
Southern Railway—H. L. Walker, E. H. Shaw and F. H. Behring.
Mobile and Ohio Ry.—Walter Shipley.
Illinois Central Railroad—J. L. Shepard.
Carolina, Clinchfield & Ohio Railroad—C. A. Smith.
Nashville Traffic Bureau—T. M. Henderson.
Knoxville Traffic Bureau—C. R. Moffett.
Chattanooga Sewer Pipe Works—B. R. Shepard.
West Tennessee Gravel Co.—F. J. Fuller.
Franklin Limestone Co.—S. C. Balshe and W. G. Bush.
Herbert Stone Fertilizer Co.—T. L. Herbert.

By order entered September 18, 1920, this Commission upon complaint and upon its own motion suspended tariffs of the lines herein before mentioned, publishing intrastate rates between stations on respondents' lines in Tennessee, and a hearing concerning the unreasonableness of the rates under suspension was ordered and a full and complete hearing was had in the office of the Commission on November 11th and 12th, 1920, at which time testimony was taken and exhibits filed. No statistical evidence was offered showing the necessity for the advanced rates under suspension, except that an

estimate was made showing the approximate loss sustained
15 by reason of the suspension. No evidence was offered tending to show that the service performed, or that the cost of such service was any different as between the several different carriers, or as between the several different states through which they operated.

The proof shows that the Southern Railway prior to the period of Federal control of railroads, was voluntarily operating over its lines in Tennessee, a scale of rates on common brick, which scale was advanced by the Director General in his Order No. 28 to the extent of one dollar per one thousand brick, and that the Southern Railway, is now seeking to further advance this mileage scale 25 per cent, and has published and filed with the Commission rates upon this basis, which rates apply on common brick, car load minimum ten thousand brick, and are as follows:

Distance.	Rate per 1,000 brick.
50 miles and under	$2.50
100 " " over 50	2.82
150 " " " 100	3.13
200 " " " 150	3.75
250 " " " 200	4.38

The testimony offered did not show that these rates were unreasonable or unjustly discriminatory.

The suspended rates on sewer pipe, car load, were shown to be unreasonable and unjustly discriminatory when compared with rates being operated by carriers in other States; and they were also shown to be unreasonable and unjustly discriminatory when compared with voluntary interstate rates as operated by carriers out of Chattanooga, Tennessee.

The suspended rates on other commodities as named in the order were shown to be higher than the rates being operated by most of the said carriers on intrastate traffic in other States and it was admitted by defendants that interstate rates on stone in Tennessee were unduly preferential and were discriminatory when compared with the advanced rates on intrastate shipments.

The Commission had judicial knowledge which leads it to believe that the same might also be said as to the intrastate rates on gravel, car load.

16 We are of the opinion and find that the suspended rates on common brick, car load, as published by the Southern Railway in its mileage scale as hereinbefore set out, should be allowed to become effective, and that other rates on common brick, carload between points in Tennessee may be allowed to become effective provided that no advanced rate, or rates, shall exceed the mileage scale of rates of the Southern Railway as hereinbfore set out, and

We are further of the opinion and find that the suspended rate on sewer pipe (earthen, clay or concrete), carload, should be canceled, and

We are further of the opinion and find that the suspension on th other commodities named should be vacated and set aside excep that the suspended rates on stone and gravel, carload, when used i the construction of public highways and consigned to Federal, State County or Municipal authorities, or their bona fide agents, shoul not be allowed to become effective.

An appropriate order will be issued.

Order.

The Commission having on date hereof, made and filed a repor containing its findings of fact and conclusions thereon, which repor is hereby referred to and made a part hereof,

It is ordered, That the carriers respondents herein be, and the are hereby notified and required to cease and desist from and afte date hereof, and thereafter to abstain from publishing, demandin or collecting any higher rates for the transportation of intrastat freight between points in Tennessee than in the succeeding para graphs hereof, and

It is further ordered, That the Southern Railway may charge fo and collect on intrastate shipments of common brick, car load, mini mum 10,000 brick, the mileage scale as hereinbefore set out, an that no change be made in the application of said mileage scale other intrastate rates on common brick, car load, as published b respondent carriers and in effect immediately prior to thi original suspension, may be advanced 25 per cent, provide
17 that no advanced rate shall exceed the mileage scale of th Southern Railway as hereinbefore set out. In assimilatin the different rates and mileage scales an estimated weight of pounds per brick shall be used, and

It is further ordered, That respondents hereto shall make no ad vances in their rates on intrastate shipments of sewer pipe (earthen clay or concrete), car load, over and above the rates on said com modities as in effect immediately prior to the date of this origina suspension, and

It is further ordered, That on car load shipments of stone an gravel moving intrastate between points in Tennessee, when for us in building public highways and consigned to Federal, State, County or Municipal authorities, or their bona fide agents, that carriers re spondent hereto shall make no advance in the rates and charges ove and above those in effect immediately prior to the effective date o the original suspension on these commodities, and

It is further ordered, That this order shall continue in effect fo a period of not less than two years from date when it shall take effect unless otherwise ordered by this Commission.

B. A. ENLOE,
Chairman.
HARVEY H. HANNAH,
Commissioner.
GEORGE N. WELCH,
Commissioner.

STATE OF TENNESSEE,
County of Davidson:

I, J. H. Corbitt, Secretary of the Tennessee Railroad and Public Utilities Commission, do hereby certify that the above and foregoing is a true and exact copy of the order of the Tennessee Railroad and Public Utilities Commission dated November 19, 1920.

Witness my hand at Nashville, this the 14th day of September, 1921.

J. H. WEST,
Secretary.

18 EXHIBIT "B."

7078.

Interstate Commerce Commission.

No. 12132.

Tennessee Rates and Charges.

In the Matter of Intrastate Rates and Charges in the State of Tennessee.

19 No. 12132.

Tennessee Rates and Charges.

In the Matter of Intrastate Rates and Charges in the State of Tennessee.

Submitted June 4, 1921. Decided August 3, 1921.

Respondents' intrastate rates in Tennessee, on stone and gravel, in carloads, for use in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, maintained by state authority, found to result in undue prejudice to shippers of interstate traffic, in undue preference of shippers of intrastate traffic, and in unjust discrimination against interstate commerce. Rates prescribed which will remove such prejudice, preference, and discrimination. Intrastate rates on common brick and sewer pipe, in carloads, not found unduly preferential or prejudicial.

Henry Thurtell and Nelson W. Proctor for respondents.

J. O. Hendley for the Railroad and Public Utilities Commission of the state of Tennessee.

B. R. Shepherd for Chattanooga Sewer Pipe Works; C. R. Moffett for Traffic Bureau of Knoxville and Sherman Concrete Pipe Company; T. M. Henderson for Traffic Bureau of Nashville, T. L. Her-

bert & Son, W. G. Bush & Company, and Fulcher Brick Company; F. J. Fuller and J. E. Rodes for Franklin Limestone Company; Robert S. Henry for Tennessee Automotive Trades Association and Tennessee Automobile Association.

Report of the Commission.

BY THE COMMISSION:

This proceeding was instituted upon petition of certain steam railroads operating in Tennessee to determine whether the intrastate carload rates required by the Railroad and Public Utilities Commission of that state on sewer pipe (earthen, clay, or concrete); on common brick; and on stone and gravel, when for use in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, are unlawful in their relation to petitioners' interstate rates on the same commodities. By our order of investigation all steam railroads in Tennessee subject to our jurisdiction were made respondents.

20 In Increased Rates, 1920, 58 I. C. C., 220, hereinafter referred to as Ex Parte 74, we authorized an increase of 25 per cent in freight rates on interstate traffic in the southern group, which includes Tennessee. Rates thus increased became effective August 26, 1920. Tariffs publishing similarly increased intrastate rates in Tennessee, as well as increased intrastate passenger fares and other charges corresponding to those authorized interstate in Ex Parte 74, were allowed to go into effect shortly afterward by the Tennessee commission, except that the proposed increased rates on "road building material (when consigned to federal, state, county, or municipal authorities or their bona fide agents), sand, gravel, brick, sewer pipe, fertilizer and fertilizer material," were suspended. The Tennessee Central, the Birmingham & Northwestern, and the Gulf, Mobile & Northern, however, were granted an increase of 25 per cent without exception because of urgent financial needs, and their rates will, therefore, not be considered herein.

On November 19, 1920, the Tennessee commission vacated its suspension order but prohibited any increases in rates on sewer pipe (earthen, clay, or concrete), and on stone and gravel, when for use in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents. An increase in the rates on common brick, hereinafter called brick, was permitted, subject to limitations which are set forth infra.

Rates on brick and sewer pipe will be stated in cents per 100 pounds, except as otherwise indicated, and those on stone and gravel in amounts per net ton.

Brick.

Rates on brick in Tennessee are generally published in the form of distance scales, although there are numerous specific rates, notably between points on the Louisville & Nashville. The Southern has a

distance scale on its Knoxville division which is lower than the intrastate scales on most other lines and, including the increases following Ex Parte 74, is as follows:

Distance.	Rate per 1,000 brick.	Rate per 100 pounds.
		Cents.
50 miles and under	$2.50	5
100 miles and over 50 miles	2.82	5 5
150 miles and over 100 miles	3.13	6 5
200 miles and over 150 miles	3.75	7 5
250 miles and over 200 miles	4.38	9

The Tennessee commission authorized publication of the foregoing rates by the Southern and also permitted the other respondents
21 to increase their rates to the same level but not to exceed 25 per cent. The effect of this was to prevent increases in the rates of the other carriers, except for short distances and distances greater than 250 miles.

Brick is produced at about 40 points in Tennessee, distributed throughout the state. The principal shipping points, according to respondents' evidence, are Nashville, Chattanooga, Scottsville, Kingsport, and Robbins. The weighted-average intrastate haul is about 60 miles and the maximum about 250 miles. About 60 per cent of the shipments are hauled less than 50 miles, and 90 per cent less than 160 miles. Respondents submitted an exhibit, based on actual single-line intrastate hauls during the year ended September 30, 1920, to show the general level of the Tennessee rates. The following statement, drawn therefrom, gives the weighted-average rates charged for various distances; the present rates, which include the increases authorized by the Tennessee commission; and the proposed rates, which represent a uniform increase of 25 per cent over the former rates. The present scale of the Nashville, Chattanooga & St. Louis, which is higher than that of the other principal Tennessee lines, is also shown as it would be if increased 25 per cent.

Distances.	Average rates charged.	Average present rates.	Average proposed rates.	N. C. & St. L. present scale increased 25 per cent.
	Cents.	Cents.	Cents.	Cents.
5 miles and less.....	....	.....	.....	6.5
10 miles and over 5....	2.67	3.62	3.65	7
15 miles and over 10...	4.68	5.06	5.92	7
20 miles and over 15...	4.87	5.09	6	7
25 miles and over 20...	6.12	6.12	7.89	7.5
30 miles and over 25...	4.03	4.87	5.06	7.5
35 miles and over 30...	6.03	6.16	7.3	7.5
40 miles and over 35...	4.03	5.1	5.39	7.5
45 miles and over 40...	5.2	5.78	6.43	7.5
50 miles and over 45...	5.47	5.47	6.97	8
55 miles and over 50...	6.32	6.41	7.82	8
60 miles and over 55...	5.61	6.42	6.92	8
65 miles and over 60...	5.1	6.1	7.82	8
70 miles and over 65...	5.3	6.08	6.81	8
75 miles and over 70...	6.55	6.55	8.13	9
80 miles and over 75...	6.16	6.34	7.87	9
85 miles and over 80...	6.36	7.53	8.04	9
90 miles and over 85...	7	7	9	9
95 miles and over 90...	7.37	8.13	9	9
100 miles and over 95..	7	7	9	9.5
110 miles and over 100.	6.64	6.89	8.34	9.5
120 miles and over 110.	5.73	6.16	7.25	9.5
130 miles and over 120.	6.19	6.28	7.75	10
140 miles and over 130.	7.95	9.39	10	10
150 miles and over 140.	7.82	8.3	9.76	10.5
160 miles and over 150.	8.74	9.13	10.81	10.5
170 miles and over 160.	8.5	11.95	12.23	10.5
190 miles and over 170.	....	.....	.....	11.5
200 miles and over 190.	9	9	11.5	11.5
210 miles and over 200.	9	9	11.5	12
220 miles and over 210.	....	.....	.....	12
230 miles and over 220.	9	9	11.5	12.5
240 miles and over 230.	9	9	11.5	12.5
250 miles and over 240.	6	7.5	7.5	13

22 The volume of movement over certain lines was estimated and in other respects the exhibit from which these figures were taken does not afford a wholly acceptable test of the measure of the particular rates which respondents seek to increase. Apparently the exhibit includes all shipments of brick, although rates on common brick only are involved; and it includes a large tonnage that moved under rates upon which an increase of 25 per cent was allowed by the Tennessee commission. The effect, if shipments under such rates were excluded, is illustrated by the following example: For dis-

nces under 10 miles the exhibit shows a total movement of 37,-10,740 pounds, average rate charged, 2.67 cents, average present ate, 3.62 cents, and average proposed rate, 3.65 cents. The Tennes-e commission, however, authorized an increase of 25 per cent in he rates applicable on all this tonnage except 285,140 pounds that noved over the lines of the Nashville, Chattanooga & St. Louis and he Mobile & Ohio. The present and proposed rates on the ship-ents that moved over these lines average 5.14 and 6.67 cents, re-pectively. By the same process of elimination the rates for many ther distance groups would be substantially affected. In a few in-ances it would result in lower average rates, but in general it would sult in higher.

Respondents compare the Tennessee rates with rates on brick in ther territories as exhibited by complainants in National Paving rick Mfg. Asso. v. A. & V. R. R. Co., No. 10733, now pending, hich involves rates on brick of all kinds throughout the country st of the Rocky Mountains. According to these comparisons, rates Tennessee, if increased uniformly 25 per cent over those in force ugust 26, 1920, would average lower than the rates in central and stern trunk line territories, where the traffic density is much reater than in Tennessee. Respondents also show that the Tennes-e rates, if thus increased, would average lower than those under he current Shreveport scale. They cite numerous interstate scales nd specific rates on brick in southern territory with which these verage Tennessee rates would not be out of line. On the other and, the Tennessee commission submits a number of comparative atements showing rates applying interstate in the south which are latively lower than the intrastate rates sought by respondents. It so calls attention to scales applying intrastate in Georgia, Flordia, nd Alabama which, including the increases following Ex Parte 74, e lower than the Tennessee rates.

The intrastate rates of the various lines in Tennessee differ widely nd respondents' exhibits are largely based upon comparisons of verage rates. There is no complete or satisfactory showing of the lationship between the state and interstate rates of individual roads.

Nor is there evidence regarding the rates or traffic of many of the smaller lines, except a mere statement of their intra-state distance scales. In the following table the present rates Tennessee, which respondents seek to increase, as typified by a eighted average of the rates applicable on shipments that moved uring the year ended September 30, 1920, and by an average of he scale rates of the different lines, are compared with specific inter-ate rates for corresponding distances between points in Tennessee nd points in other states, shown in exhibits, and with the rates rescribed for the Southern and the Alabama Great Southern in leridian Traffic Bureau v. S. Ry. Co., 60 I. C. C., 5.

Distances.	Weighted average intrastate rates.		Average intrastate scale rates.		Specific interstate rates.	Meridian scale.
	Present.	Proposed.	Present.	Proposed.		
	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.
5 miles and less			5	5.8	.....	4.5
10 miles and over 5	5.14	6.67	5.1	6	.....	4.5
15 miles and over 10	5.32	6.46	5.3	6.5	5.5	5
20 miles and over 15	5.12	6	5.5	6.7	5.5	5
25 mles and over 20	6.12	7.89	5.7	7.2	6.5	5
30 miles and over 25	5.31	6.93	6	7.5	5.0–6.5	5.5
35 miles and over 30	5.73	7.24	6	7.7	6.5–7.5	5.5
40 miles and over 35	5.48	6.9	6	7.5	.....	5.5
45 miles and over 40	5.1	6	6	7.5	6.5	6.5
50 miles and over 45	5.47	6.97	6	7.6	7.5	6.5
55 miles and over 50	6.34	7.84	6.4	8	5.5–5.6–8.0	6.5
60 miles and over 55	6.3	7.81	6.4	8	5.5–6.5	6.5
65 miles and over 60	6.1	7.82	6	7.5	5.5–7.0–8.0	7
70 miles and over 65	6.32	7.82	6	7.5	7.5	7
75 miles and over 70	6.55	8.13	6.2	7.8	7.0–8.0	7
80 miles and over 75	6.25	7.83	6.3	7.9	7.5	7
85 miles and over 80	6.78	8.66	6.3	8.1	7.5	7.5
90 miles and over 85	7	9	6.5	8.1	6.5–7.0–7.5–9.0	7.5
95 miles and over 90	7	9	6.5	8.1	8.0–9.0	7.5
100 miles and over 95	7	9	6.6	8.3	6.5	7.5

110 miles and over 100.....	7.08	8.24	6.8	8.9	7.0–8.0–9.5	8
120 miles and over 110.....	6.59	7.64	7	8.9	7.0–8.0–9.5	8
130 miles and over 120.....	6.98	7.82	7.3	9.3	8.0–9.5	8
140 miles and over 130.....	8	10	7.5	9.5	8.0–9.0–10	8
150 miles and over 140.....	8	10	8	10	9	9
160 miles and over 150.....	8.5	10.5	8	10	9.0–9.5–10.5–13.5	9
170 miles and over 160.....	8.5	10.5	8	10	7.5–8.5–9.5	9
180 miles and over 170.....			8.5	10.7	9.5–10	9
190 miles and over 180.....			8.5	10.7	7.5–9.5–10.5–11.5	9.5
200 miles and over 190.....	9	11.5	8.8	11	7.5–10	9.5
210 miles and over 200.....	9	11.5	9	11.2	10–12	.....
220 miles and over 210.....			9.5	12	10	.....
230 miles and over 220.....	9	11.5	10	12.5	10.5–12.5	.....
240 miles and over 230.....	9	11.5	10	12.5	12.5–16.5	.....
250 miles and over 240.....			10.5	13	10.5–12.5	.....

The average intrastate rates shown above were ascertained by excluding from respondents' exhibits rates subject to the full increase of 25 per cent under the order of the Tennessee commission and by making appropriate allowance for authorized lesser increases in other rates. The proposed intrastate rates average higher than most of the interstate rates cited in comparison or the rates prescribed in the Meridian Case.

The record affords many illustrations of changes in former relationships between interstate and intrastate rates which respondents allege result in unjust discrimination against interstate commerce.

To points south of Nashville on the Nashville, Chattanooga,
24 & St. Louis the route from Chattanooga is interstate through Georgia and Alabama. The rates from Chattanooga to those points have been increased 25 per cent, while the intrastate rates from Nashville have not been increased, resulting in the changed relationships shown in the following table:

To—	Distances from—		Rate from Chattanooga.		Rate from Nashville.	
	Chattanooga.	Nashville.	Prior to ex parte 74.	Present.	Prior to ex parte 74.	Present.
	Miles.	Miles.	Cents.	Cents.	Cents.	Cents.
Sherwood, Tenn. . .	55	96	6.5	8	7	7
Decherd, Tenn.	70	82	6.5	8	7	7
Winchester, Tenn..	72	85	6.5	8	7	7
Estill Springs, Tenn.	75	77	7	9	7	7
Tullahoma, Tenn...	82	69	7	9	6.5	6.5
Manchester, Tenn..	94	81	7	9	7	7
Shelbyville, Tenn..	104	63	7.5	9.5	6.5	6.5
Fayetteville, Tenn..	108	121	7.5	9.5	7.5	7.5
McMinnville, Tenn.	116	103	7.5	9.5	7.5	7.5
Lewisburg, Tenn...	136	149	8	10	6.5	6.5

To Lexington, Tenn., the distances from Nashville and Paducah, Ky., via the Nashville, Chattanooga & St. Louis are 127 and 118 miles, respectively. Under Ex Parte 74 the rate from Paducah was increased from 7.5 to 9.5 cents, while the Nashville rate of 8 cents has not been increased. Similar examples are found in the rates of other lines. Adams, Tenn., on the Louisville & Nashville is 42 miles from Nashville and 31 miles from Hopkinsville, Ky., a brick-producing point. Prior to Ex Parte 74 the rate from both Hopkinsville and Nashville was 5 cents. The rate from Hopkinsville is now 6.5 cents. Etowah, Tenn., on the Louisville & Nashville, is 77 miles from Chattsworth, Ga., and 82 miles from Knoxville, both brick-producing points. On August 26, 1920, the rate from Chattsworth was increased from 5 cents to 6. 5 cents, but no increase has been made in the intrastate rate of 5.5 cents from Knoxville.

The refusal of the Tennessee commission to permit a full increase of 25 per cent in the intrastate rates has given an advantage to intra-

state routes that compete with interstate routes between certain points. For example, the shortest route from Nashville to Memphis and other destinations in western Tennessee is over the Nashville, Chattanooga & St. Louis, either directly or in connection with other lines. To many of the same points there is also an interstate route, only slightly longer, over the Louisville & Nashville via Guthrie, Ky. Formerly the rates over these routes were the same, but since the interstate rate has been increased, traffic has been diverted to the intrastate route.

These and similar illustrations offered by respondents fall short, however, of proving that the intrastate rates as a whole or those of individual lines unjustly discriminate against interstate commerce. Some of the intrastate rates appear too low in comparison with certain interstate rates cited by respondents, but many instances are given of rate relationships which suggest a contrary conclusion. According to respondents' exhibit the present rate of the Mobile & Ohio from Henderson, Tenn., to Pinson, Tenn., 5.8 miles, is 7 cents; an increase to 9 cents is sought. The same carrier maintains rates of 5.5 cents from Gilmore, Tenn., to Corinth, Miss., 62 miles, and 9.5 cents from Columbus, Miss., to Jackson, Tenn., 181 miles. A rate of 7 cents applies from Melville, Tenn., to Dayton, Tenn., 21 miles, over the Cincinnati, New Orleans & Texas Pacific, and from Chattanooga to Cleveland, Tenn., 29 miles over the Southern, which respondents seek to increase to 9 cents. The present rate is higher than any specific interstate rate cited for corresponding distances. The intrastate rates of the Illinois Central are generally as high as, or higher than, the rates from Paducah, Ky., to points on its line in Tennessee for corresponding distances. The proposed rates would be higher than those from Paducah in almost every instance.

Respondents cite a rate of 6 cents from Robbins, Tenn., to Chattanooga, 116 miles over the Cincinnati, New Orleans & Texas Pacific, as being unduly prejudicial in relation to the rate of 6.5 cents from Calhoun, Ga., to Chattanooga, 59 miles over the Nashville, Chattanooga & St. Louis. The rate from Robbins could be increased to 6.5 cents without exceeding the Tennessee scale. The maintenance of relatively unequal rates by different carriers from different originating points to a common destination does not constitute undue prejudice against shippers or communities. Stone Products Co. v. Director General, 61 I. C. C., 51. Furthermore, the 6.5-cent rate applies to Chattanooga from points in Alabama on the Nashville, Chattanooga & St. Louis and the Southern much farther distant than is Calhoun. The rate to Chattanooga from Florence, Ala., 167 miles, is 7.5 cents; from Tunnel Hill, Ga., 30 miles, 5 cents; and from Resaca, Ga., 53 miles, 5.6 cents.

The rates to Jackson, Tenn., from Martin, Nashville, and Puryear, Tenn., are also claimed to be unjustly discriminatory in relation to the interstate rates from Columbus, Miss., East St. Louis, Ill., St. Louis, Mo., and Paducah, Ky. A comparison of these rates follows:

From—	Distance.	Present rate.	Proposed rate.
	Miles.	Cents.	Cents.
Martin, Tenn	54	6	7.5
Puryear, Tenn	91	7	9
Nashville, Tenn	152	8.5	10.5
Paducah, Ky	106	7	....
Columbus, Miss	172	9.5	....
East St. Louis, Ill	253	16.5	....
St. Louis, Mo	258	16.5	....

26 The rates on brick maintained by the Louisville & Nashville from Nashville to stations in Tennessee on the main line of its Nashville & Decatur division are already on a higher basis than the rates from Coaldale and Sibleyville, Ala., important producing points, to the same destinations, as the following statement shows:

	From Coaldale.		From Nashville.		
To—	Distance.	Rate.	Distance.	Present rate.	Proposed rate.
	Miles.	Cents.	Miles.	Cents.	Cents.
Columbia	156	9	45	6	7.5
Glendale	150	9	51	6.5	8
Pleasant Grove	146	9	55	6.5	8
Campbells	143	9	58	6.5	8
Lynnville	138	9	63	6.5	8
Bufords	134	9	67	7	9
Reynolds	132	9	69	7	9
Riversburg	130	9	71	7	9
Wales	127	8	74	7	9
Pulaski	122	8	79	7	9
Aspen Hill	116	8	85	7	9
Lesters	113	8	88	7.5	9.5
Prospect	111	8	90	7.5	9.5

On brief respondents attempt to minimize the probability of a movement from Coaldale to the places listed above, but their own evidence indicates that there have been shipments to some of these points from Sibleyville, which is in the vicinity of Coaldale and takes the same rates.

The record does not show the exact extent to which the Tennessee carriers would profit by the further increase proposed in their intrastate rates on brick. From figures based on actual movements during the year ended September 30, 1920, over the Illinois Central; Louisville & Nashville; Cincinnati, New Orleans & Texas Pacific; and Nashville, Chattanooga & St. Louis, respondents estimate that such an increase would add about $12,800 a year to the revenues of those roads.

Respondents seek authority to increase the intrastate rates on common brick involved herein upon the ground that they cause undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce on the other hand, or that they cause undue, unreasonable, or unjust discrimination against interstate commerce. While the evidence discloses certain situations which appear to result in undue preference or prejudice as between persons and localities engaged in intrastate commerce on the one hand and in interstate commerce on the other, the record affords no adequate basis for determining whether the situation should be corrected by changes in the intrastate rates or in the interstate rates or in both. The difficulty arises because of the lack of consistency as between the
27 various interstate rates and as between the various intrastate rates. The same difficulty is experienced in determining whether the intrastate rates of which complaint is made cause undue, unreasonable, or unjust discrimination against interstate commerce because of their unreasonably low level. So far as situations exist which are in need of correction, in our opinion they can best be handled by conference and cooperation between the Tennessee commission and respondents or by specific complaint to us by the persons or localities who believe they are subjected to undue prejudice.

Sewer Pipe.

Sewer pipe is manufactured at two points in Tennessee, Chattanooga and Knoxville. The plant at Chattanooga manufactures earthenware pipe. Similar pipe is manufactured at St. Louis, Mo., Louisville, Ky., Columbus, Macon, and Rome, Ga., Pomona, N. C., Roanoke, Va., and at various points in Alabama. The Chattanooga manufacturer controls the Georgia and Alabama plants, and has no substantial competition with earthenware pipe in Tennessee except in the western part of the state with pipe from St. Louis and Louisville. Knoxville manufactures concrete sewer pipe which competes with the earthenware product shipped from Chattanooga and interstate points.

The evidence for respondents shows quite fully the intrastate rates of the Southern, applying principally from Chattanooga and Knoxville to points in eastern Tennessee, but little evidence was offered in regard to other intrastate rates. The intrastate rates of the Southern if increased 25 per cent would be lower than the current Shreveport scale, but it appears that no sewer pipe is manufactured at Shreveport and that class rates apply on shipments from that point.

The following illustrations were given of alleged unduly prejudicial relationships between interstate and intra-state rates and routes:

Haul.	Route.	Distance.	Present intrastate rates.	Proposed intrastate rates.	Interstate rates.
From Chattanooga to—		Miles.	Cents.	Cents.	Cents.
Nashville	S. Ry.-T. C.	328	10	12.5	....
Do.	N. C. & St. L.	152	....	....	12.5
Clarksville	C. N. O. & T. P.-T. C.	597	17.5	22	....
Do.	N. C. & St. L.-L. & N.	237	....	....	22
Knoxville	S. Ry.	111	9	11.5	....
Do.	N. C. & St. L.-S. Ry.	148	....	....	11.5
Do.	N. C. & St. L.-L. & N.	239	....	....	11.5
From Knoxville to—					
Jellico	S. Ry.	65	9.5	12	....
Do.	L. & N.	81	....	....	12

28 The interstate and intrastate rates to these points were formerly the same. The present disparities, however, are not necessarily indicative of undue prejudice against shippers or communities. The interstate and intrastate routes are composed of wholly different carriers, except that from Chattanooga to Knoxville the Southern operates the intrastate route and also participates in one of the interstate routes. The interstate routes to Knoxville are materially longer and involve hauls over two lines. It was conceded at the hearing that the intrastate rate from Chattanooga to Nashville might properly be increased to 12.5 cents and that rate was made effective on June 30, 1921. It appears also that there is no opposition to the proposed increase in the intrastate rate from Chattanooga to Clarksville.

The following comparisons offered by respondents disclose apparent discriminations against interstate traffic:

Knoxville to—	Distance.	Present rate.	Proposed rate.
Jellico, Tenn.	65	9.5	12
Clairfield, Tenn.	79	10	12.5
Pruden, Tenn.	83	10.5	13
Fonde, Ky.	85	13	....
Cumberland Gap, Tenn.	66	8	10
Middlesboro, Ky.	69	10	....

Fonde and Middlesboro are the northern termini of branch lines of the Southern and appear to be the only interstate points served by these branches. Respondents' exhibits show that the proposed rates to the Tennessee points are relatively no higher than the interstate rates for corresponding distances from Chattanooga to certain points in Tennessee on the Nashville, Chattanooga & St. Louis, and from Rome, Campania, and Columbus, Ga., and Greensboro, N. C., to certain points in Alabama, Virginia, North Carolina, and South Caro-

lina. It appears, however, that the present rates are as high as the interstate rates maintained by the Southern between points on its Memphis division and by the Southern and the Nashville, Chattanooga & St. Louis from Chattanooga to points in Georgia and Alabama.

The following statement compiled from an exhibit submitted by respondents shows the intrastate rates from Chattanooga and Knoxville to points in eastern Tennessee as compared with those from Rome, Ga., Louisville, Ky., and Roanoke, Va., to the same destinations.

To—	From Knoxville.			From Chattanooga.			From Rome.		From Louisville.		From Roanoke.	
	Distance.	Present rate.	Proposed rate.	Distance.	Present rate.	Proposed rate.	Distance.	Present rate.	Distance.	Present rate.	Distance.	Present rate.
	Miles.	Cents.	Cents.	Miles.	Cents.	Cents.	Miles.	Cents.	Miles.	Cents.	Miles.	Cents.
Bristol	106	12	15	242	15	19	281	22	342	30	150	19
Johnson City	106	11.5	14.5	217	14.5	18	254	21.5	373	31.5	115	25
Greenville	74	10	12.5	185	14	17.5	224	20.5	341	31.5	207	25
Bulls Gap	55	9	11.5	166	13	16.5	205	24	322	31.5	226	25
Morristown	42	8	10	153	12.5	15.5	192	19	309	29	239	25
Jefferson City	29	7	9	140	12	15	179	22	282	29	252	25
Knoxville	...	....	....	111	9	11.5	150	14.5	267	25	281	25
Lenoir City	23	7	9	88	10.5	13	127	17.5	290	28	304	28
Sweetwater	41	8	10	70	9.5	12	109	15.5	308	28	322	28
Athens	55	9	11.5	56	9	11.5	95	14.5	322	28	336	28
Cleveland	82	10.5	13	29	7	9	68	12.5	345	28	363	28
Chattanooga	111	9	11.5	...	....	....	78	8	316	25	392	28

Exhibits submitted by the Chattanooga shipper show that the Tennessee rates increased 25 per cent would be higher generally than those prescribed in Meridian Traffic Bureau v. S. Ry. Co., supra, higher than the intrastate rates in Georgia, Alabama, and North Carolina, as increased following Ex Parte 74, and higher than many interstate rates maintained by respondents for corresponding distances between points in Tennessee and points in other states. These exhibits include comparisons of the present and proposed intrastate rates of various Tennessee lines for main-line, branch-line, and joint hauls, with through interstate rates for hauls of similar class and length. The following comparisons of the rates of the Southern from Chattanooga are taken from these exhibits:

Chattanooga to—	Distance.	Present rate.	Proposed rate.	Southern Ry. interstate scale.	Meridian scale.	Alabama scale.	Georgia scale.	North Carolina scale
	Miles.	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.
Southern Ry. (main line).								
Athens, Tenn.	56	9	11.5	9	9	6.2	6.5	8
Sugar Valley, Ga.	55	9.5	....	....	....	....	....	....
Roddy, Tenn.	62	9	11.5	9.5	9.5	7	7	8
Oostanaula, Ga.	61	10	....	....	....	....	....	....
Lenoir City, Tenn.	88	10.5	13	10.5	10.5	8.2	8.8	9.5
Attalla, Ala.	87	11.5	....	....	....	....	....	....
Brice, Ga.	91	11.5	....	....	....	....	....	....
Sunbright, Tenn.	106	11.5	14.5	11.5	12	8.8	9.8	10
Knoxville, Tenn.	111	9	11.5	11.5	12	9.6	10	10.5
Braswell, Ga.	108	13	....	....	....	....	....	....
Mascott, Tenn.	125	12	15	12	12.5	10	10.3	10.5
Decatur, Ala.	122	11.5	....	....	....	....	....	....
Isham, Tenn.	137	12.5	15.5	12.5	12.5	10	10.8	11.5
Mableton, Ga.	138	13	....	....	....	....	....	....
Newport, Tenn.	175	13	16.5	14	14	12	12	12.5
Stockbridge, Ga.	172	14	....	....	....	....	....	....
Sheffield, Ala.	167	13	....	....	....	....	....	....
Florence, Ala.	172	13	....	....	....	....	....	....
Talladega, Ala.	166	11.5	....	....	....	....	....	....

Chattanooga to—	Distance.	Present rate.	Proposed rate.	Southern Ry. interstate scale.	Meridian scale.	Alabama scale.	Georgia scale.	North Carolina scale
	Miles.	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.	Cents.
Johnson City, Tenn.	217	14.5	18	15	....	13.2	13	14
Floville, Ga.	204	15.5	....	....	....	....	....	....
Corinth, Miss.	217	15	....	....	....	....	....	....
Bristol, Tenn.	242	15	19	16.5	....	13.8	13.5	14.5
Holton, Ga.	232	17	....	....	....	....	....	....
Selma, Ala.	241	14.5	....	....	....	....	....	....
Southern Ry. (branch).								
Scottville, Tenn.	119	15	19	11.5	12	10	10.3	10.5
Maryville, Tenn.	127	12	15	12	12.5	10	10.3	10.5
Rutledge, Tenn.	149	19.5	24.5	12.5	13	10.8	11	12
Church Hill, Tenn.	199	21.5	27	14.5	14.5	12.6	12.5	13
Gouge, Tenn.	253	22	27.5	17	....	13.8	13.8	15
Mountain City, Tenn.	277	25	31.5	17.5	....	14.6	14.3	15
Tallulah Falls branch.	235–288	16.5–20	....	....	....	....	....	....
Marion-Blacksburg branch.	297–343	19 –24	....	....	....	....	....	....
Greenville-Alston branch	337–401	20.5–22	....	....	....	....	....	....
Joint routes.								
Kingsport, Tenn. (S. Ry.-C. C. & O.)	243	21.5	27	16.5	....	16.4	16.2	16.5

Georgia points (N. C. & St. L.-S. Ry.-M. D. & S.)	230–258	17–20	....	....	....	....	....	....
North Carolina points (S. Ry.-C. & N. W.)	327–350	18–21.5	....	....	....	....	....	....
McFarland, Tenn. (S. Ry.-L. & N.)	92	16.5	20.5	10.5	11.5	9	10.1	10.5
Junta, Ga. (N. C. & St. L.-L. & N.)	91	10.5	....	....	....	....	....	....
Appalachia, Tenn. (S. Ry-L. & N.)	97	17.5	22	10.5	11.5	10.8	11.3	11.5
White, Ga. (N. C. & St. L.-L. & N.)	98	....	....	....	....	....	....	....
Copperhill, Tenn. (S. Ry.-L. & N.)	119	19	24	11.5	12	11.9	12.4	12.5
Oakman, Ga. (N. C. & St. L.-L. & N.)	119	13	....	....	....	....	....	....
Guntersville, Ala. (S. Ry.-N. C. & St. L.)	117	11.5	....	....	....	....	....	....

The proposed intrastate rates, except the rate to Knoxville, are higher in all instances than the comparative rates cited. Respondents assert that the interstate rates maintained by the Southern between points on its Memphis division are based on rates which were originally depressed by water competition. It appears, however, that these rates have been voluntarily maintained for many years and that the rates of the boat lines to competitive points on this division are materially higher than the all-rail rates. The present rate from Chattanooga to Knoxville yields 1.62 cents per ton-mile. The proposed rate would yield 2.07 cents. The earnings under the present rate are generally higher than under the rates from Chattanooga and Birmingham, Ala., to numerous points in Georgia, Alabama, and Tennessee, cited in an exhibit of the Chattanooga shipper, for distances ranging from 89 to 239 miles.

Considering the present Tennessee intrastate rates on sewer pipe as a whole, the record fails to show that they are relatively lower than the rates maintained by respondents from Chattanooga and Knoxville to interstate points for comparable hauls. Particular
31 situations are subject to the same comment which we have made in the case of the rates on common brick.

Stone and Gravel.

At the hearing counsel for the Tennessee commission objected to the introduction of evidence relating to intrastate rates on stone and gravel for use in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, hereinafter referred to as municipal rates, on the ground that no order affecting such rates could be made by us because of the following provision of section 22 of the interstate commerce act: "Nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments." Objection was also offered on the ground that the Tennessee commission has no means of ascertaining what interstate municipal rates on stone and gravel are charged by respondents, since such rates are not required to be filed with us. Respondents show that they follow the general policy of publishing in the regular manner such municipal rates as they maintain.

To adopt the construction of section 22 contended for by the Tennessee commission would make it mandatory on respondents to maintain the lower municipal rates on intrastate traffic. That section has been uniformly construed by us as being permissive in character. Metropolitan Paving Brick Co. v. Ann Arbor R. R. Co., 17 I. C. C., 198,204. We have also held, in effect, that in granting such reduced rates carriers must not violate sections 2 and 3 of the act. At page 408 of our report in Dairymen's Supply Co. v. P. R. R. Co., 28 I. C. C., 406, we said:

"But, while the act authorizes the free transportation of property for the purposes named, it does not require the carriers to grant such

transportation. It follows that the carriers may grant such transportation or deny it, as they deem best, provided their practices in that respect do not result in unjust discrimination under section 2 or undue preference or prejudice under section 3 of the act."

Furthermore, the Tennessee commission's order prescribing reduced municipal rates on stone and gravel exceeds the permission which may be exercised by carriers in their discretion. The application of the order is not limited to rates on stone and gravel for state, federal, county, or municipal governments. The order applies to shipments that are merely consigned to such governments or their bona fide agents. The record shows that an extensive program of road building has been undertaken in Tennessee, and that the usual practice is to let contracts at stated amounts per mile to the lowest bidders, who provide the necessary materials and labor.
32 Under such circumstances the transportation is for the contractors rather than for the government, but the order of the Tennessee commission implies that the municipal rates shall be charged on such shipments. The statement at page 204 of our report in Metropolitan Paving Brick Co. v. Ann Arbor R. R. Co., supra, is pertinent in this connection:

"What carriers may do is one thing and what they ought to be required to do is quite another thing. Certainly the Commission has no power under the law to order carriers to transport traffic for the United States, state, or municipal governments at reduced rates. Furthermore, it is a matter of common knowledge that the United States, state, and municipal authorities rarely lay pavements themselves. Work of this kind is usually let by contract. We know of no reason why lower rates should be made for contractors of brick paving than should be made in favor of any other party who may have contracts for other work for public authorities.

We have followed the same principle in various conference rulings.

Crushed or broken stone, used in the construction of roads, is produced at a number of points in Tennessee, principally at Mimms, Newsom, Franklin, Carter's Creek, and Whitehead, in the vicinity of Nashville, and at Chattanooga, Chickamauga, Strawberry Plains, Mascot, and Knoxville, in eastern Tennessee. Producers at these points are in competition with quarrymen in adjoining states, who are shown to have been prejudiced by the action of the Tennessee commission. From Hopkinsville, Ky., a stone-producing point, to Sadlers, Adams, Cedar Hill, Kinney, and Springfield, Tenn., from 28 to 43 miles distant, the rate prior to Ex Parte 74 was 80 cents, or 10 cents lower than the intrastate rate from Franklin to the same stations for distances ranging between 48 and 63 miles. The rate from Hopkinsville has been increased to $1, reversing the former relationship, which properly reflected the differences in distance. There is also a 90-cent rate from Franklin to Gallatin, South Tunnel, Fountain Head, Portland, and Mitchellville, Tenn., for distances

from 46 to 64 miles, which prior to August 26, 1920, was
higher than the rate from Bowling Green, Ky., a competin
to the same destinations for distances between 27 and 45 mil
Bowling Green rate is now 10 cents higher. These are loc
of the Louisville & Nashville.

To Tullahoma, Tenn., from Newsom, a distance of 86 miles
Nashville, Chattanooga & St. Louis, the rate is 90 cents. To t
point from Chattanooga via the interstate route of the same
distance of 82 miles, the rate is now $1.13, though prior to E
74 it was on a parity with that from Newsom. Cowan, Tenn
miles from Mimms and 64 miles from Chattanooga, the re
rates being 90 cents and $1. Prior to Ex Parte 74 Chattano
an advantage of 10 cents. These examples illustrate the di
tage to Chattanooga producers caused by the inability
33 Nashville, Chattanooga & St. Louis to increase its in
rates to stations on its line south of Nashville.

There is a large demand for stone for road building at M
Jackson, Dyersburg, and other places in western Tennessee
Tennessee stone is sold in competition with that shipped fr
nois, Kentucky, Arkansas, and Alabama. At the hearing o
of quarries at Newsom, Mimms, Franklin, and Whitehead p
against any increase in their rates which might prevent the
competing with interstate shippers. The evidence shows tha
crease of 25 per cent in the municipal rates in Tennessee wou
no such result. It would merely restore substantially the r
ships existing prior to Ex Parte 74, which in the main seem
been equitable. The following table shows rates to Memph
competing quarries:

To Memphis from—	Route.	Distance.	Rate prior to ex parte 74.	Present rate.	Proposed rate.
		Miles.	Cents.	Cents.	Cents.
Williford, Ark.	St. Louis-San Fran.	116	90	121.5	....
Rockwood, Ala.	Southern Ry.	173	90	112.5	....
Cedar Bluff, Ky.	Illinois Central	215	100	130	....
Newsom, Tenn.	Nashv., Chatt. & St. L.	222	100	100	125
Cerulean, Ky.	Illinois Central	227	100	130	....
Russellville, Ky.	Louisv. & Nashv.	233	160	110	....
Mimms, Tenn.	Nashv., Chatt. & St. L.	246	110	110	138
Franklin, Tenn.	Louisv. & Nashv.	280	170	120	....
Whitehead, Tenn.	do	313	180	140	....

Respondents explain that the interstate rates from Whitehead an
Russellville shown above were established by the Louisville & Nasl
ville to relieve quarrymen at those points from the disadvantag
caused by the low intrastate rate available to their competitors
Newsom and Mimms.

The Tennessee commission cites rates on crushed stone from Cer
lean, Ky., to a number of destinations in western Tennessee via th
Illinois Central, but comparisons of these rates with those from Ne
som and Mimms to the same points indicate that the intrastate mu
nicipal rates might properly be increased. To Dversburg, an im
portant consuming point, the rate from Cerulean is $1.30 and the di
tance 150 miles. From Newsom, 170 miles distant, the present rat
is $1 and the proposed rate $1.25. The rate from Cerulean to Mem
phis, 226 miles, is $1.40. From Mimms to Memphis, 246 miles, th
present rate is $1.10 and the proposed rate $1.38. Considerable stre
is laid on a line of low rates, evidently based on competitive consi
erations, from quarries near Columbia, Ill., to points in western Te
nessee on the Mobile & Ohio. To Jackson, Tenn., about 245 mil
from the Illinois quarries, the rate prior to Ex Parte 74 was 90 cen
and is now $1.20. The rate from Newsom to Jackson via th
34 Nashville, Chattanooga & St. Louis, a distance of 137 mile
is 90 cents and an increase to $1.13 is proposed. Fro
Mimms to Jackson, a distance of 161 miles, the rate is now $1 an
would be $1.25. The rates from the Illinois quarries are on such
low basis that they can not be considered a fair criterion for judgin
the reasonableness of the rates from Newsom and Mimms. Also
will be noted that even with the increases sought the latter rat
would be more favorably related to the interstate rates than the
were prior to August 26, 1920.

The principal points from which gravel is shipped are Chatt
nooga, Nashville, Knoxville, Camden, and Memphis. A large amou
of gravel is also shipped into Memphis, which is apparently the mo
important consuming point in the state. Most of the Tennessee lin
publish rates on gravel in the form of distance scales, but to th
more important destinations there are specific rates on a lower basi
fixed with reference to competitive conditions. Both the mileag
scales and the specific rates, applying on intrastate traffic, are no
relatively lower than those applicable on interstate shipments in
Tennessee, and the record shows numerous disruptions of adjus
ments of gravel rates similar to those which have been noted wit
respect to the rates on crushed stone.

To points south of Nashville on the Nashville, Chattanooga & S
Louis the interstate rates of that carrier from Chattanooga are out
line with its intrastate rates from other points. To Murfreesbor
118 miles from Camden and 119.5 miles from Chattanooga, th
rates from both points were 90 cents prior to Ex Parte 74. The ra
from Chattanooga is now $1.13. Tullahoma, an important co
suming point, is 155 miles from Camden and 82 miles from Chatt
nooga. An increase of 25 per cent in the rate from Chattanoo
has made it $1, putting it on a parity with that from Camden a

depriving Chattanooga shippers of an advantage in rates based on their shorter distance. In the same manner Camden has been given lower rates for greater distances to Bell Buckle and Fosterville.

The following table indicates the advantage accorded to Camden under the present relationship of rates to Memphis from various producing points:

To Memphis from—	Route.	Distance.	Rate prior to ex parte 74.	Present rate.
		Miles.	Cents.	Cents.
Camden, Tenn.	Nashv., Chatt. & St. L.	152	70	70
Batesville, Miss.	Illinois Central	59	..	87
Gravel Siding, Miss.	Southern Ry.	120	70	88
Morrison Miss.	do	120	70	88
Oldham, Miss.	do	117	70	88
Golden, Miss.	Illinois Central	133	..	87.5
Iuka, Miss.	Southern Ry.	116	70	88
Gravel Switch, Ky.	Illinois Central	189	..	100

35 To other destinations in western Tennessee rates from Camden, if increased 25 per cent, would not be unduly high in comparison with rates to the same places from interstate points. Thus, an increase from 60 to 75 cents for the haul of 68 miles from Camden to Union City via the Nashville, Chattanooga & St. Louis appears to be proper, in view of the fact that from Elco, Ill., via the Mobile & Ohio, the rate to the same point is $1.07 for a distance of 78 miles. To Jackson, 67 miles from Camden over the Nashville, Chattanooga & St. Louis, respondents seek an increase from 70 to 88 cents. The rate of the Mobile & Ohio to Jackson from Elco is $1.20 for a distance of 139 miles. From Gravel Switch, Ky., to Jackson there is a rate via the Illinois Central of $1 for 133 miles. To Martin, Tenn., 79 miles from Gravel Switch, the same rate applies. From Camden to Martin, 55 miles, the rate sought by the Nashville, Chattanooga & St. Louis is 88 cents, increased from 70 cents.

Shippers of gravel at Camden complain that they are unable under the present rates to sell gravel at points on the main line of the Illinois Central in western Tennessee in competition with the pit at Gravel Switch, Ky. As previously shown, the Illinois Central publishes a rate of $1 from Gravel Switch to Memphis, 189 miles, presumably to put the pit there in competition with Camden and the Mississippi pits. From Camden to Memphis, 152 miles, the present rate is 70 cents and the proposed rate 88 cents. The rate from Gravel Switch applies as maximum at intermediate points between Memphis and Wingo, Ky., 135 miles from Memphis. To many of those points, such as Dyersburg, Ripley, and Covington, Camden has an advantage of about 15 miles in distance, but as there are no joint rates in effect from Camden, the latter point is seriously

handicapped in competition with Gravel Switch. The present rate from Camden to Covington, constructed by combination on Gibbs, is $1.35. On behalf of the Nashville, Chattanooga & St. Louis it is stated that joint rates from Camden low enough to meet the rates from Gravel Switch could not be profitably divided between the two lines over which the traffic moves. It may be that Camden shippers are entitled to joint rates lower than the full combination, but considering the short hauls and other conditions it does not follow that the joint rates from Camden should be relatively no higher than the local rates of the Illinois Central from Gravel Switch.

From figures based on actual movements of stone and gravel during the year ended September 30, 1920, respondents estimate that the refusal of the Tennessee commission to permit the increases in rates on those commodities when used for road building is
36 costing the Louisville & Nashville, the Nashville, Chattanooga & St. Louis, and the Southern railways, in the aggregate, about $16,445 annually.

The record conclusively shows that with few exceptions the proposed rates on stone and gravel would not exceed respondents' interstate rates on these commodities between points in Tennessee and points in adjacent states for similar distances. The latter rates are shown by numerous comparisons to be relatively just and reasonable. In authorizing an increase in the rates on stone and gravel for commercial purposes the Tennessee commission impliedly approved the general level of those rates as increased. The lower rates on municipal shipments unjustly discriminate against and unduly prejudice interstate commerce.

Findings.

Subject to the reservations set forth in connection with our discussion of the rates on common brick and sewer pipe, in carloads, we find that respondents' intrastate rates on those commodities between points in Tennessee are not shown to cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and in interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

We further find that the increases made by respondents in their interstate rates for the transportation of stone and gravel, in carloads, under our decision relating to the southern group in Ex Parte 74, results in reasonable charges for the interstate transportation of those commodities between points in Tennessee and points in adjoining states and that the failure of said respondents within the state of Tennessee correspondingly to increase their intrastate rates and charges for the transportation of stone and gravel when used in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, in force on the date of our decision in Ex parte 74, has resulted in the

t and will result in the future in lower rates on those commodi-
than the corresponding interstate rates between points in Ten-
see and points in adjoining states and in undue prejudice to
sons and localities in interstate commerce between points in Ten-
see and points in adjoining states; in undue preference to per-
ns and localities in Tennessee; and in unjust discrimination against
erstate commerce.

We further find that said undue prejudice, preference, and dis-
mination can and should be removed by making increases in the
rastate rates for the transportation of stone and gravel, in car-
ds, when for use in the construction of public highways and con-
signed to federal, state, county, or municipal authorities or
their bona fide agents, in force on the date of our decision
in Ex Parte 74, which shall correspond with the increases
retofore made and now in effect as aforesaid in the interstate rates
the transportation of said commodities shipped in interstate com-
erce between points in Tennessee and points in adjoining states.

These findings are without prejudice to the right of the authori-
s of the state of Tennessee or of any other party in interest to
ply in the proper manner for a modification of our findings and
der as to any specific intrastate rate or rates for the transportation
the commodities named on the ground that the latter are not re-
ted to the interstate rate or rates in such a way as to contravene
e provisions of the interstate commerce act.

Schedules giving effect to these findings may be made effective on
t less than five days' notice.

An appropriate order will be entered.

Order.

t a General Session of the Interstate Commerce Commission Held
at Its Office, in Washington, D. C., on the 3d Day of August,
A. D. 1921.

No. 12132.

Tennessee Rates and Charges.

the Matter of Intrastate Rates and Charges in the State of Ten-
nessee.

This case being a proceeding instituted by the Commission upon
tition filed, and having been duly heard and submitted by the
rties, and full investigation of the matters and things involved
aving been had, and the Commission, on the date hereof, having
ade and filed a report containing its findings of fact and conclu-
ons thereon, which said report is hereby referred to and made a
rt hereof:

It is ordered, That the common carriers by steam railroad parties
this proceeding, namely, The Alabama Great Southern Railroad

Company; Arkansas & Memphis Railway, Bridge & Terminal Com
pany; Athens & Tennessee River Railroad Company; Carolina
Clinchfield & Ohio Railway; Central of Georgia Railway Company
Chattanooga & Montlake Railway; Chattanooga Station Company
Chicago, Memphis & Gulf Railroad Company; The Chicago, Rock
Island & Pacific Railway Company; The Cincinnati, New Orleans &
Texas Pacific Railway Company; East Tennessee & Western North
Carolina Railroad; Harriman & Northeastern Railroad Company
Illinois Central Railroad Company; Knoxville, Sevierville & Eastern
Railway Company; Laurel Railway Company; Laurel Fork Rail
way; Little River Railroad; Louisville & Nashville Railroad Com
pany; Memphis Terminal Corporation; Memphis Union Station
Company; Middle Tennessee Railroad Company; Missouri Pacific
Railroad Company; Mobile & Ohio Railroad Company; Morgan &
Fentress Railway Company; The Nashville, Chattanooga & St. Louis
Railway; Norfolk & Western Railway Company; Oneida & Western
Railroad Company; Pigeon River Railroad Company; Procter Coal
Company's Switch; St. Louis-San Francisco Railway Company;
Southern Railway Company; Tennessee Railroad Company; Ten
nessee & Carolina Southern Railway Company; Tennessee & North
Carolina Railway; Tennessee, Alabama & Georgia Railroad Com
pany and Charles Hicks, receiver; Tennessee, Kentucky & Northern
Railroad Company; Tennessee Copper Company's Railroad; Ten
nessee & Cumberland River Railroad Company; Unicoi Railway;
Union Railway (Memphis); Wauhatchie Extension Railroad Com
pany; Western & Atlantic Railroad; and Yazoo & Mississippi Valley
Railroad Company, according as they respectively partici
39 pate in the transportation, be, and they are hereby, notified
and required to cease and desist from practicing the undue
prejudice, undue preference and advantage, and unjust discrimina
tion found in said report to exist in the relation of interstate rate
for the transportation of stone and gravel, in carloads, when for use
in the construction of public highways and consigned to federal,
state, county, or municipal authorities or their bona fide agents, and
to establish, put in force, and maintain rates for the transportation
of said commodities in intrastate commerce within the state of Ten
nessee which shall exceed the rates of said respondents for the trans
portation of said commodities in effect July 29, 1920, and applicable
to such transportation, in amounts corresponding to the increases
heretofore made by said respondents and now in effect under Ex
Parte 74 referred to in said report, in said respondents' rates for the
transportation of said commodities in interstate commerce within
the state of Tennessee and between points in the state of Tennessee
and points in adjoining states; provided, however, that nothing in
this order shall be construed as requiring or authorizing any com
mon carrier to establish, put in force, or maintain any rate for the
transportation of property in intrastate commerce which is greater
than its corresponding rate contemporaneously in effect and ap
plicable to the transportation of property in interstate commerce
from, to, or at the same points.

It is further ordered, That nothing in this order shall be construed as prohibiting any carrier, party to this proceeding, from increasing any rate for the transportation of property in intrastate commerce, prescribed in this order, provided such increased rate does not exceed its corresponding rate contemporaneously in effect and applicable to the transportation of property in interstate commerce, and provided further that such increase is made pursuant to the laws of the state of Tennessee, and with the approval of the authorities of said state.

It is further ordered, That this order shall become effective, on or before October 13, 1921, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of the Commission in the premises.

And it is further ordered, That a copy of this order be served upon each of the carriers named in the second paragraph of this order.

By the Commission.

[Seal of the Interstate Commerce Commission.]

[SEAL.] GEORGE B. McGINTY,
Secretary.

A true copy:

GEORGE B. McGINTY,
Secretary.

40 *Motion of the United States to Dismiss the Petition.*

Filed November 14, 1921.

United States of America, respondent, by its counsel, now comes and moves the court to dismiss the petition in the above-entitled cause at the cost of the petitioners.

As grounds for this motion it is shown—

1. It does not appear from the face of the petition or otherwise that the court has jurisdiction to entertain the same.

2. The order of the Interstate Commerce Commission runs against and is directed to Nashville, Chattanooga & St. Louis Railway, and other steam railroad carriers operating within The State of Tennessee, and does not run against and is not directed to The State of Tennessee, or The Railroad and Public Utilities Commission of Tennessee, neither of which, by reason whereof, has any standing in this court to maintain the petition against the United States.

41 3. The petition, with the exhibits attached thereto and made a part thereof, is without equity on its face and does not state any cause of action against the defendant; and the court may not grant the relief prayed or any part of the same.

4. The report of the Interstate Commerce Commission and order entered in pursuance thereof were made and entered after full hearing and due notice, and rest on substantial evidence adduced on the issues made by the parties, and the matters and things alleged in the petition and sought to be put in issue are foreclosed by the findings of fact.

5. It appears from the petition that the order of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended was authorized by the Acts to Regulate Commerce and the Transportation Act, 1920, and that it was regularly made and entered by the Commission in a proceeding properly pending and conducted.

6. The petitioners have not in and by the petition shown that in making the order the Interstate Commerce Commission transcended the power conferred upon it by the statute or violated any right of the petitioners protected by the Constitution of the United States or any other right of the petitioners over which the court may exercise jurisdiction.

Wherefore, and for divers other good causes appearing on the face of the petition, more fully to be pointed out on the hearing hereof, respondent prays that its motion be sustained, and for such other and further action as may be appropriate.

BLACKBURN ESTERLINE,
Assistant Solicitor General.
LEE DOUGLAS,
United States Attorney.

42 *Motion for Hearing Before Three Judges.*

(Filed January 17, 1922.)

To the Honorable Judges of the United States District Court for the Middle District of Tennessee, Nashville Division, sitting in equity:

The petitioners in this cause, named hereinabove, by their solicitors of record, now come and move the Court that the motion filed on November 14, 1921 by the United States of America, to dismiss the petition herein, be set for hearing and final disposition on the earliest practicable date, to be fixed by the Court; and that said motion shall be heard and determined by three judges, of whom at least one shall be a circuit judge; and that counsel for all parties hereto may be notified by the Clerk of this Court of the date fixed by the Court for said hearing.

FRANK M. THOMPSON,
Attorney General and Reporter of Tennessee.
WM. H. SWIGGART, JR.,
Assistant Attorney General and Reporter of Tennessee.

43 *Appearance of Interstate Commerce Commission.*

(Filed January 16, 1922.)

To the Honorable Judges of said Court:

We hereby enter the appearance of the Interstate Commerce Commission as intervening defendant, and of ourselves as its counsel, in the above entitled case.

P. J. FARRELL.
J. CARTER FORT.

January 14, 1922.

44 *Order Allowing Interstate Commerce Commission to Intervene as a Party Defendant.*

(Entered February 20, 1922. Sanford, Judge.)

This cause coming on to be heard on the motion of the Interstate Commerce Commission, to be permitted to intervene as a party respondent herein, and the petition having been duly considered, and it appearing to the court that said Interstate Commerce Commission has such an interest in the subject matter of this suit as to make it a proper party respondent:

It is, therefore, considered by the court that said Interstate Commerce Commission, be and is hereby permitted to intervene as a party respondent and file such pleadings as from time to time may seem to it appropriate.

This order to be without prejudice in any proceedings heretofore had in this cause.

SANFORD,
Judge United States District Court of the Middle District of Tennessee.

Approved for entry:

45 *Order Fixing Date for Hearing on the Motion to Dismiss.*

(Entered January 2, 1922. Sanford, Judge.)

On motion of the petitioners, the written motion of the United States of America to dismiss the petition herein is set for hearing at nine o'clock A. M. Saturday, February 18th, in the Federal Court Room at Nashville, Tennessee, before three judges.

The clerk will forthwith give notice of this order to the solicitors of record for all parties and intervenors.

This January 31, 1922.

Approved for filing:

SANFORD,
Judge.

46 *Answer of the Interstate Commerce Commission.*

(Filed February 18, 1922.)

The Interstate Commerce Commission, intervening defendant the above-entitled suit, now and at all times hereafter saving a reserving to itself all manner of benefit and advantage of exceptio to the many errors and insufficiencies in the petitioners' petitio contained, for answer thereunto, or unto so much or such pa thereof as this defendant is advised is material for it to make answ unto, answer and says:

I.

Answering paragraph I of the petition, this intervening defen ant, which for convenience will be referred to hereinafter as t Commission, admits for the purposes of this suit, that the allegatio of fact contained in said paragraph are true.

II.

Answering paragraph II of the petition, the Commission admi for the purposes of this suit that the allegations of fact contained said paragraph are true, except that the Commission denies that t State of Tennessee, or its various governmental subdivisions, or t United States Government, or any one of them, is or will be i juriously affected by the order of the Commission as alleged in t last subdivision of said paragraph II.

III.

Answering paragraphs III, IV, and V of the petition, the Com mission admits and alleges that in Increased Rates 1920, 58 I. C. C 220, hereinafter called Ex parte 74, it authorized an increase of 2 per cent in freight rates on interstate traffic in the southern grou which includes Tennessee; that rates thus increased became effecti August 26, 1920; that tariffs publishing similar increased intrasta rates in Tennessee, as well as increased intrastate passenger far and other charges corresponding to those authorized for interst application in Ex parte 74, were allowed to go into effect short afterward by petitioner, the Railroad and Public Utilities Commi
sion of Tennessee, hereinafter called the Tennessee com
47 mission, except that certain proposed increased rates on roa
building materials, when consigned to Federal, State, county or municipal authorities or their bona fide agents, and on san gravel, brick, sewer pipe, fertilizer, and fertilizer material, wer suspended; that on November 19, 1920, the Tennessee commissio vacated its suspension order but prohibited an increase in rates o intrastate shipments of sewer pipe (earthen, clay, or concrete) an of stone and gravel, in carloads, when for use in building publi

highways and consigned to Federal, State, county, or municipal authorities or their bona fide agents.

The Commission further admits and alleges that it instituted a proceeding of investigation, No. 12132 entitled "In the Matter of Intrastate Rates and Charges in the States of Tennessee," under the provisions of section 13 of the interstate commerce act, pursuant to a petition of certain steam railroads operating in Tennessee, to determine whether the intrastate carload rates required by the Tennessee commission on sewer pipe (earthen, clay or concrete), on common brick, and on stone and gravel, when for use in the construction of public highways and consigned to Federal, State, county, or municipal authorities or their bona fide agents, were unlawful in their relation to interstate rates on the same commodities in that they caused or would cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in intrastate commerce, on the one hand, and interstate commerce, or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce within the meaning of and in violation of the interstate commerce act; and to determine what rates and charges should be prescribed in order to remove such advantage, preference, prejudice, or discrimination, if any should be found to exist; that in said proceeding the full hearing provided for in section 13 of said act was accorded to each of the petitioners and to all interested parties; that at said hearing a large volume of testimony and other evidence, bearing upon said questions, was submitted to the Commission for consideration; that at said hearing and subsequently, both orally and in briefs filed
48 in said proceeding, said questions were fully argued and the matters involved in said proceeding were submitted to the commission for determination, whereupon the Commission made its report and order in said proceeding, which said report and order stated the Commission's findings, decision, conclusion, and requirements in the premises, and which said report and order are attached hereto, made a part hereof, and marked Exhibit A; that said report and said order were, and are, and each of them was and is, fully supported and justified by the record before the Commission in said proceeding.

The Commission further alleges that in making said report, findings, and order it considered and weighed carefully, in the light of its own knowledge and experience, every fact, circumstance, and condition called to its attention on behalf of the parties to said proceeding, including matters covered by the allegations in the petition herein. The Commission further alleges that said report, findings, and order were not made by it either arbitrarily or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making said report and said order it did not exceed the authority duly conferred upon it, or exercise that authority in an unreasonable manner.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the petition herein in so far as they conflict either with the allegations in this

answer, or with either the statements or conclusions of fact included in the Commission's said report, findings, and order.

All of which matters and things the Commission is ready to aver, maintain, and prove as this honorable court shall direct, and hereby prays that said petition be dismissed.

INTERSTATE COMMERCE COMMISSION.
J. CARTER FORT,
Assistant Counsel.
P. J. FARRELL,
Of Counsel.

49 CITY OF WASHINGTON,
District of Columbia, ss:

Joseph B. Eastman, being duly sworn, deposes and says that he is a member of the Interstate Commerce Commission, the above-named intervening defendant, and makes this affidavit on behalf of said Commission; that he has read the foregoing answer and knows the contents thereof, and that the same is true.

JOSEPH B. EASTMAN.

Subscribed and sworn to before the undersigned, a notary public within and for the District of Columbia, this 14th day of February, 1922.

[Notary Seal.] ALFRED HOLMEAD,
Notary Public.

50 *Order Allowing the Illinois Central Railroad Company, the Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway to Intervene as a Party Defendant.*

(Entered February 20, 1922. Sanford, Judge.)

This cause coming on to be heard on the motion of the Illinois Central Railroad Company, the Louisville & Nashville Railroad Company ans The Nashville, Chattanooga, & St. Louis Railway to be permitted to intervene as parties respondent herein, and the petition having been duly considered, and it appearing to the court that said railroads have such an interest in the subject matter of this suit as to make them proper parties respondent;

It is, therefore, considered by the Court that said Illinois Central Railroad Company, Louisville & Nashville Railroad Company and the Nashville, Chattanooga & St. Louis Railway, be and the same are hereby permitted to intervene as parties respondent and file such pleadings as from time to time may seem to them appropriate.

This order to be without prejudice in any proceedings heretofore had in this cause.

Approved for entry:

SANDFORD,
Judge United States District Court of the Middle District of Tennessee.

51 (Entered February 20, 1922. Sanford, Judge.)

This cause coming on to be heard on the motion of the Illinois Central Railroad Company, The Louisville & Nashville Railroad Company and The Nashville, Chattanooga & St. Louis Railway, for authority to formally adopt as their own the motion to dismiss heretofore filed by and on behalf of the United States, and

It appearing to the Court that the motion should be granted,

It is, therefore, considered that said motion to dismiss as filed by and on behalf of the United States shall be considered the motion of the Illinois Central Railroad Company, the Louisville & Nashville Railroad Company and The Nashville, Chattanooga & St. Louis Railway.

Approved for entry:

SANFORD,
Judge United States District Court of the Middle District of Tennessee.

52 *Per Curiam Opinion on Motion to Dismiss.*

(Filed April 1, 1922. H. M. Doak, Clerk.)

Submitted February 18, 1922. Decided March —, 1922.

Before Denison, Circuit Judge, and Sanford and Ross, District Judges.

Per Curiam:

The State of Tennessee, acting both in its own behalf and upon the relation of the Railroad and Public Utilities Commission of Tennessee, joined with that commission in filing a bill of complaint directed against the United States. Since the purpose of the bill was to enjoin the enforcement of an order made by the Interstate Commerce Commission, proceedings were had pursuant to the jurisdiction and practice fixed for the Commerce Court under sections 207, 208 and 209 of the Judicial Code and the Act of October 22nd, 1913. (U. S. C. C. of 1916, Section 998.) Pursuant to the latter section, a motion for a preliminary injunction regularly came on to be heard before the court as now constituted. On such hearing the Illinois Central Railroad Company and the Nashville, Chattanooga and St. Louis Railway were permitted to intervene and to join in the motion made by the United States to dismiss the bill for lack of equity. The Interstate Commerce Commission also was permitted to and did intervene as a defendant and file its answer. Upon the hearing of the motion to dismiss, it was stated by counsel for the United States and for the intervening railroads that if the motion to dismiss were overruled, they did not desire to file any answer or further pleadings. It was also agreed between counsel for the State of Tennessee and counsel for the Interstate Commerce Commission that the latter's answer was not intended to raise any issue of fact and that the case was ap-

propriate for final hearing on the bill and answer. It was therefore agreed by counsel for all parties that the hearing upon the motion and upon bill and answer should be treated as a final hearing, and that a final decree might be entered thereon.

53 Prior to July 29th, 1920, the freight rates in Tennessee and adjoining states upon broken stone, cement and similar road building materials had been established by the Interstate Commerce Commission and by the State Utilities Commission within their respective fields at the same amounts in each. On the day named the Interstate Commerce Commission by its order "ex parte 74" authorized an increase of 25% in freight rates in this general territory in interstate traffic, and the railroads here intervening adopted this increase. They also filed with the State Commission a tariff making the same proportionate advance in their intrastate rates on all traffic. This was suspended by the State Commission and a hearing had, as a result of which the State Commission approved the increase as to all intrastate traffic, excepting that in road building materials consigned to the United States, or the state or a municipality therein, or consigned to a contractor for such public use. As to this excepted traffic the railroads were directed to maintain the formerly existing and lower rate.

Thereupon the railroads applied to the Interstate Commerce Commission to have the intrastate rate on this excepted traffic fixed by that Commission so as to include the same 25% advance which had been given on all interstate traffic. The railroads alleged that the order of the State Commission, which in effect, prescribed for the intrastate traffic in these fields a rate of 20% lower than that which had been established for the interstate shipments of the same materials, was an undue and unjust discrimination against interstate traffic. There was a full hearing before the Interstate Commerce Commission and it found that in this respect undue preference to persons and localities in Tennessee and unjust discrimination against interstate commerce did result, which should be removed by raising the intrastate rate on these articles shipped to the United States or to the state or counties or cities, to the same price charged against all shippers or consignees. This order was entered August

54 30th, 1921 and was identified as No. 12132. This is the order, the enforcement of which this suit is brought to enjoin.

The general power and jurisdiction of the Interstate Commerce Commission to fix an intrastate rate, as to which it had found the existence of discrimination and prejudice against interstate commerce, were not distinctly challenged by the bill; and since the hearing of the motion herein such jurisdiction and power have been definitely declared by the Supreme Court in the case of Wisconsin vs. United States, decided February —, 1921. The only question which is here for decision is one arising under section 22 of the Interstate Commerce Act, which so far as it is here material, declares—

"that nothing in this act shall prevent the carriage, storage, *storage* or handling of property free or at reduced rates for the United States, state or municipal governments, * * *"

Whether the effect of this section is to deprive the commission of jurisdiction to make an order preventing discrimination and preference in shipments for these favored parties is the controlling question.

Before reaching the merits we find that the right of the State to maintain this bill is challenged upon formal grounds. It is said that the State's only right to complain depends upon the order of the State Commission authorizing this preference, and that the order of that commission was without jurisdiction and is invalid. We doubt whether the existence of any valid order by the State Commission is essential. The right of the State, either in its own interest as a contingent shipper or in the right of its citizens, to attack an order of the Interstate Commerce Commission affecting rates within the state, seems not to be doubted. (North Dakota vs. C. & N. W. Ry. U. S. S. C. Jan'y 23, 1922.) If there had been no order by the State Commission and if Section 22 has the scope and effect now claimed for it, the State and its municipalities would have the right to negotiate with the railroads for the preferential treatment which Section 22 contemplates and to obtain such discrimination in their favor if they could. The Interstate Commerce Commission order now attacked denies this right and forbids the railroads to grant such a preference if they should wish to. It cannot be controlling that at present they do not so desire; they may change their minds; and this order would stand as a deterrent both against a change of policy by the railroads generally and against a tendency by any one of them to break away from the existing policy of all.

However, we see no substantial occasion to doubt the jurisdiction and power of the State Commission, when exercised in the lack of any action by the Interstate Commission. The former was created, and its general powers are fixed, by Chapter 10 of the Acts of 1897 of the Legislature of Tennessee. By section 8 it has power—"* * * to supervise and fix the rates * * * of railroad freight and passenger tariffs on the different railroads in this state."

Clearly this authority covers the action which has been here taken, unless there is restriction elsewhere in the act. Sections 15 and 17 prohibit any carrier from receiving from any person or corporation a greater or less compensation than it charges any other person or corporation for doing a like service in the transportation of like property under substantially like circumstances and conditions, and from giving any undue or unreasonable preference or advantage to any particular person or corporation or any particular description of traffic. These provisions are not direct limitations upon the power of the commission to authorize rates which do make discrimination; they rather imply the power of the commission to permit preference and discrimination if the commission shall decide that it is not undue or unjust or that the services involved are not under like circumstances and conditions; and their utmost indirect effect is to prohibit the fixing of such discriminatory rates as are in fact

undue and unjust. It is distinctly held in Interstate Comm
Commission vs. Baltimore & Ohio Railroad, 145 U. S. hereafter
cussed, that a preferential rate given to the state or municipa
is not necessarily unjust or undue; and it follows that section
and 17 do not necessarily deprive the Commission of jurisdic
to allow such preferential rates.

Section 24 of the Tennessee Act is somewhat similar to se
22 of the Interstate Commerce Act, and provides that the law sh
not prevent any railroad company from transporting freight a
duced rates for certain specified purposes, among which shipm
to a state or municipality are not mentioned. However
56 do not think this enumeration of permitted preferences
be taken as exclusive. Each one of the enumerated
erences involves a benefit which, if public at all, is so indirect
the right to make the preference would be doubtful unless it
specifically given. The enumeration should not be construe
exclude a case where the public benefit is as direct as it is wh
state or municipality actually pays the freight. As the Supr
Court said of a similar section in 145 U. S. at page 278,—"
section is illustrative, rather than exclusive."

If there ever was any doubt of the right of such a commissio
fix a rate for a particular service under special conditions at a fi
less than the maximum allowed for such general service (
Shore Railroad vs. Smith, 173 U. S. 684, 693) that doubt ca
survive the decision in Pennsylvania Railroad vs. Towers, 245 U
6, 17.

Being *this* convinced that the State, with or without the sup
of the State Commission's order, has a right to be heard as to
substance of its complaint, we pass to the meritorious question.

Sections 2 and 3 of the Interstate Commerce Commission
both before and after the amendment of February 28th, 1920, fo
discrimination in rates between persons with reference to like ser
in like traffic under similar circumstances and conditions, and fo
undue or unreasonable preference to any person or corporatio
in respect to any particular traffic. Section 22, already qu
expressly permits not merely reduced rates in favor of partic
named persons but even free carriage. It is the contention of
United States that when these three sections are read together,
tion 22 is so modified by Sections 2 and 3 that it remains for
commision to *deice* whether a preference which might arise u
Section 22, nevertheless might involve the previously forbidden
crimination or advantage. We cannot give this construction.
Interstate Commerce Commission vs. Baltimore & Ohio Rail
Company, 145 U. S. 263, 278, Section 22 was under consider
and it was expressly said that even in the absence of this se
free or reduced transportation of the property of the United S
or states or municipal governments would not necessarily b
unjust discrimination. This is obvious if for no other reason
because freight charges which are paid by the public
57 be in one way or another assessed back against the public
cluding the railroads, in the form of taxes, as well as be

transportation for the public may be exacted in partial consideration for the public rights which the carrier has received. It cannot be thought that transportation furnished to private shippers and that furnished to the public are given under substantially similar circumstances and conditions. Hence it cannot necessarily follow that every discrimination is unjust. We think it should be inferred that Section 22 is a legislative declaration of the fact recognized in the case just cited, and that its effect is to leave the Commission without jurisdiction to forbid the railroads from carrying freight for the public at a less price than it charges individuals for the same carriage of the same freight; in other words, it excludes this particular traffic from the rate structure which the Commission is authorized to erect and control, in still other words, there is freedom of discrimination.

This conclusion does not necessarily make it improper that such reduced rates should be given pursuant to a tariff regularly filed or should be subject to a measure of regulation and supervision, so that that authorized preference may not be abused or may not become a pretext or cover for some forbidden discrimination; but the reported actions of the Commission, so far as brought to our attention, do not claim such right of regulation, except that it may fix a maximum. (U. S. vs. Alabama Ry. 40 I. C. C. 405)

Of course this giving of a preference under Section 22 is wholly permissive; the section does not confer upon any municipality the right to demand a preference. Nevertheless, the existence of the power is of value to the municipalities. They thereby get the right to competition in rates among the carriers for this traffic. The carriers at present do not wish to compete in this particular, but any order which prevents them from so doing whenever they may desire to operate directly to prejudice and destroy the municipal right which is recognized and preserved by Section 22.

What has so far been said leads to the conclusion that the Interstate Commerce Commission would be without authority to
58 make an order applicable solely to interstate traffic and forbidding a preferential rate to a state or a city or county. The right of this Commission to regulate or fix an intrastate rate, whether arising under the former laws or under the Transportation Act of 1920, is collateral and incidental to its rights to regulate interstate traffic; the branch may overhand the intrastate field only because the branch is essential to the maintenance of the tree planted in interstate soil. The incident cannot exist without the principal fact to which it is collateral; the branch cannot keep its position if there is no tree. The Interstate Commission's whole power to regulate interstate Commerce is modified by the exception that it may not forbid discrimination in favor of a state. Its power to control intrastate commerce must be modified by the same exception.

We think the Interstate Commission order should be enjoined and the State Commission order should remain in force. Manifestly this result should follow only so far as the freight in question is to be carried "for the United States, state or municipal governments." The Preference should not be determined by the mere fact that the

government is or is not shipper or consignee. Precisely the proper provision seems to be made by the Interstate Commerce Commission Conference Ruling, No. 36, which permits the preference to be given only in case the title to the property passes to the government or is vested in the government at the point of the origin of its transportation. (Havens vs. Chicago Railway, 20 I. C. C. 156) No other formula now occurs to us by which it can be made certain that only the government will get the benefit of the preference.

Counsel may prepare and submit a final decree in accordance with these views.

A. C. DENISON
Circuit Judge.
EDWARD T. SANFORD,
J. W. ROSS, *District Judges.*

59 *Final Decree.*

(Entered April 24, 1922. A. C. Denison Circuit Judge; Edward T. Sanford, District Judge; J. W. Ross, District Judge.)

This cause came on to be heard at this term and was argued by counsel, upon the motions and pleadings on file and upon the stipulation of all parties in open court that no further pleadings or proofs were desired and that the cause should be submitted as upon final hearing; and thereupon upon consideration thereof and in accordance with the written opinion handed down by the court, it is ordered, adjudged and decreed as follows, viz:

1. That the several motions of the United States and intervenors herein to dismiss the petition, be and are overruled;

2. That the order of the Interstate Commerce Commission in the matter of intrastate rates and charges in the State of Tennessee, entered August 3, 1921, and identified on the docket of said Commission as No. 12,132, directing Steam Railroad Companies to establish, put in force and maintain rates for the transportation within the State of Tennessee of stone and gravel, in carloads, when for use in the construction of public highways and consigned to federal, state, county or municipal authorities or their bona fide agents, in excess of rates charged by said companies on such transportation at and prior to the time of the entry of said order, is adjudged to be void to the extent that the rates therein ordered to be established, put in force and maintained effect or apply to such transportation, for the United States, State or Municipal governments, of stone and gravel, the title to which has passed to the government or is vested in it at the point of the origin of its transporttation; and that to the extent that said order of the Interstate Commerce Commission is hereinabove adjudged to be void, and to that extent only, it be and hereby is annulled and set aside, and that the enforcement thereof be and hereby is perpetually enjoined;

60 3. That copies of this order be served upon the defendant and the intervenors herein within five days after the entry hereof; and

4. That this injunctional order is suspended for a period of fifteen ays after its entry within which period an appeal with supersedeas ay be applied for, if desired, or within which period application ay be made to the judge of the district, to grant such further sus-ension as may be necessary to put into effect according to law the ecessary revision of rate tariffs.

Approved for entry. April 24 1922.

A. C. DENISON,
Circuit Judge.
EDWARD T. SANFORD,
J. W. ROSS,
District Judges.

51 *Petition for Allowance of Appeal.*

Filed May 19, 1922.

To the Honorable the United States District Judge for the Middle District of Tennessee:

The several intervening carriers, the Illinois Central Railroad Company, the Louisville & Nashville Railroad Company and The Nashville, Chattanooga & St. Louis Railway, feeling aggrieved by the order and decree rendered and entered in the above entitled cause on the 24th day of April, 1922, do hereby appeal therefrom to the Supreme Court of the United States for the reasons set forth in the assignments of error filed herewith, and pray that this their appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and papers upon which said order and decree was vested, duly authenticated, be sent
52 to the Supreme Court of the United States under the rules of such Court made and provided.

And your petitioners, now appellants, further pray that a proper order relating to the security be required of them be made.

JNO. BELL KEEBLE,
Attorney for L. & N. Railroad Company.
CHAS. N. BURCH,
Attorney for I. C. Railroad Company
FITZGERALD HALL,
Attorney for N., C. & St. L. Railway.

Filed in the Clerk's Office May 19, 1922.

H. M. DOAK,
Clerk of the United States District Court, Middle District of Tenn., Nashville Division,
By E. L. DOAK,
D. C.

63 *Order Allowing Appeal.*

On motion of Charles N. Burch, John Bell Keeble and Fitzgerald Hall, Esquires, solicitors and counsel for appellant carriers, it is hereby ordered that an appeal to the Supreme Court of the United States from the order and decree heretofore on April 24th, 1922, entered and filed in this cause in the United States District Court, Middle District of Tennessee, Nashville Division, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal for appellant carriers, towit, the Illinois Central Railroad Company, the Louisville & Nashville Railroad Company and The Nashville, Chattanooga & St. Louis Railway shall be fixed in the sum of Two hundred and fifty dollars and said bond having been given by said appellants, is approved.

64 This May 20, 1922

EDWARD T. SANFORD,
United States District Judge,
Middle District of Tennessee.

Filed in the Clerk's Office, United States District Court, Middle District of Tenn., Nashville Division, May 20, 1922.

H. M. DOAK,
Clerk U. S. Dist. Court.
By N. T. ARNETT,
D. C.

65 *Assignment of Errors.*

Filed May 19, 1922.

Now come the respondent and the intervenors, now appellants, in the above entitled cause and file the following assignment of errors and upon them and each of them will rely upon their prosecution of an appeal in said cause from the order and decree made by this Honorable Court on the 24 day of April, 1922.

I.

Error is assigned upon the said order and decree because the Court erred in granting an injunction on the ground that the order of the Interstate Commerce Commission, (identified in the record as No. 12132), was beyond its jurisdiction and void.

II.

66 Error is assigned upon the said order and decree because the Court erred in holding and decreeing that the order of the Railroad and Public Utilities Commission of the State of Ten-

ssee dated November 19, 1920 was made in the legal exercise by id Commission of the powers vested in it by the statutes and laws the State of Tennessee.

III.

Error is assigned upon said order and decree because the Court rred in holding and decreeing that the Interstate Commerce Commission has under no circumstances and conditions any power over ither intrastate or interstate rates when the consignor and consignee ome within the excepted classes set forth in Section 22 of the Interstate Commerce Act, to wit: the United States, the States, counties nd municipal governments.

IV.

Error is assigned upon said order and decree because the Court rred in holding and decreeing that the Interstate Commerce Commission's power to regulate rates so that they may conform to Sections 2 and 3 of the Act to Regulate Commerce is modified by the exception contained in Section 22 of said Act that it may not forbid perference in favor of the United States, a State or the political subdivisions thereof.

V.

Error is assigned upon said order and decree because the Court erred in overruling the motion of the United States, joined in by the Interstate Commerce Commission and the intervening railroad companies, to dismiss the petition or bill of complaint of complainants for lack of equity on its face.

67

VI.

Error is assigned upon said order and decree because the Court erred in enjoining and setting aside the order of the Interstate Commerce Commission (identified in the record as No. 12132), fixing certain intrastate rates in Tennessee on certain road making material when transported as the property of the United States, the State of Tennessee, or a county or municipality thereof.

VII.

Error is assigned upon said order and decree because the Court erred in holding that the Interstate Commerce Commission had exceeded its authority and jurisdiction in fixing intrastate rates in Tennessee on certain road making material when transported as the property of the United States, the State, a county or a municipality thereof.

VIII.

Error is assigned upon said order and decree because the Court erred in holding that the State of Tennessee, or the Railroad and

Public Utilities Commission of the State of Tennessee has power and authority to require carriers to grant preferential rates on intrastate traffic in Tennessee in favor of the United States, the State of Tennessee, or a county or municipality thereof, and power further to require carriers to transport such traffic at rates less than those fixed by the State Railroad and Public Utilities Commission as reasonable for the transportation of the same traffic under similar circumstances and conditions for other shippers in general.

IX.

Error is assigned upon said order and decree because the Court erred in construing Section 22 of the Act to Regulate Com-
68 merce as being dominant over Sections 2 and 3 of said Act and not subservient and subordinate to said Sections 2 and 3 of said Act.

Wherefore, appellants pray that said order and decree be reversed and that said United States District Court for the Middle District of Tennessee, Nashville Division, be ordered to enter a decree reversing its decision in said cause.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By JOHN BELL KEEBLE,
Atty.
ILLINOIS CENTRAL RAILROAD COMPANY,
By CHAS. N. BURCH,
Atty.
THE NASHVILLE CHATTANOOGA & ST. LOUIS RAILWAY,
By FITZGERALD HALL,
Atty.

Filed in the clerk's office, May 19, 1922.

H. M. DOAK,
Clerk of the United States District Court,
Middle District of Tenn., Nashville Division.

69 *Citation on Appeal.*

To the State of Tennessee, B. A. Enloe, Harvey H. Hannah, Julian H. Campbell, Esquires, members of and constituting the Railroad and Public Utilities Commission of the State of Tennessee; Alfred A. Taylor and Frank M. Thompson, Esquires, Governor and Attorney General respectively of the State of Tennessee, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington in the District of Columbia within thirty days from the date hereof,

ursuant to an order allowing appeal filed and entered in the office of the Clerk of the District Court of the United States for the Middle District of Tennessee, Nashville Division, from the order and decree of said Court, signed, filed and entered n the 24th day of April, 1922, in that certain suit being in equity No. 3604 wherein the State of Tennessee, Railroad & Public Utilities Commission of Tennessee and the State of Tennessee, on relation of the Railroad and Public Utilities Commission of Tennessee, are petitioners or complainants, now appellees, and the United States is respondent, and the Interstate Commerce Commission, Louisville & Nashville Railroad Company, Illinois Central Railroad Company and The Nashville, Chattanooga & St. Louis Railway are nterveners to show cause, if any there be, why the order and decree rendered against said respondent, the United States, as in said order allowing appeal mentioned should not be corrected and why justice hould not be done to the parties in that behalf.

Witness the Honorable Edward T. Sanford, Judge of the United States District Court for the Middle District of Tennessee, Nashville Division, this 20 day of May, 1922.

EDWARD T. SANFORD,
United States District Judge for the Middle District of Tennessee.

Filed in the office of the Clerk of the United States District Court for the Middle District of Tennessee, Nashville Division, on May 20, 1922.

H. M. DOAK,
U. S. District Court Clerk,
By N. T. ARNETT,
D. C.

Due and legal service of the within citation is hereby acknowledged, copy received and further service and notice waived. Copy of petition for appeal, order allowing appeal and assignments of error also received and accepted, this 20 day of May, 1922.

WM. H. SWIGGART, JR.,
Assistant Attorney General of the State of Tennessee and Attorney for Complainants and Appellees.

71 *Appeal Bond.*

(Filed May 20, 1922.)

Know all men by these presents that we, the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and The Nashville, Chattanooga & St. Louis Railway, principals, and Fitzgerald Hall and W. R. Cole as sureties, are held and firmly bound unto the State of Tennessee, the Railroad and Public Utilities

Commission of Tennessee, in the sum of Two hundred and fifty Dollars, lawful money of the United States, to be paid to them and their respective successors, to which payment, well and truly to be made, we bind ourselves and each of us jointly and severally and each of our successors, heirs and assigns, by these presents.

Signed and sealed this the 20 day of May, 1922.

Whereas, the above named Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and The Nashville, Chattanooga & St. Louis Railway, have prosecuted an appeal
72 to the Supreme Court of the United States to reverse the order and decree of the United States District Court for the Middle District of Tennessee, Nashville Division, rendered on April 24, 1922 in the above entitled cause;

Now, therefore, the condition of this bond is such that if the above named Louisville & Nashville Railroad Company, Illinois Central Railroad Company and The Nashville, Chattanooga & St. Louis Railway shall prosecute their said appeal to effect and answer all costs if they fail to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
By JOHN BELL KEEBLE,
Principal.
ILLINOIS CENTRAL RAILROAD COMPANY,
By CHAS. N. BURCH,
Principal.
THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
By FITZGERALD HALL,
Principal.
FITZGERALD HALL,
Surety.
W. R. COLE,
Surety.

This bond is approved, this May 20, 1922.

EDWARD T. SANFORD,
United States District Judge,
Middle District of Tenn.

Filed in the Clerk's Office, this May 20, 1922.

H. M. DOAK,
Clerk of the United States District Court,
Middle District of Tennessee,
Nashville Division.
By N. T. ARNETT,
D. C.

3 *Statement of Evidence to be Included in the Record on Appeal in the Above Cause, Prepared, Approved, and Filed to Conform to Equity Rule No. 75.*

Upon the hearing of said cause the complainant introduced no evidence save Exhibits Numbers A and B, filed with and as a part of the original bill of complaint.

Neither respondent nor intervenors introduced any evidence nor filed any affidavits. Said Exhibits A and B are not of such character as to admit of substantial condensation and on that account need not be set forth herein.

We agreed that the above statement is a full compliance with Equity Rule No. 75, and that the same may be approved by the Judge of the United States District Court for the Middle District of Tennessee, Nashville Division, in conformity to said Rule to be included in the record of the cause on appeal to the Supreme Court of the United States.

This May 20, 1922

JOHN BELL KEEBLE,
CHAS. N. BURCH,
74 FITZGERALD HALL,
Attorneys for Appellants.
FRANK M. THOMPSON,
Attorney General;
WM. H. SWIGGART, JR.,
Attorneys for Appellees.

The above statement prepared conformably to Equity Rule No. 75 having been presented to me and the same having been agreed to by counsel for the respective parties to the cause, the same is hereby approved. Let the same be filed and become a part of the record for the purpose of appealing the cause. This May —, 1922.

—— ——,
Judge United States District Court.

Filed in the Clerk's office, May 20, 1922.
H. M. DOAK,
Clerk United States District Court,
Middle District of Tennessee,
Nashville Division.
By N. T. ARNETT,
D. C.

75 *Præcipe for Transcript of Record.*

To H. M. Doak, clerk of the District Court of the United States of the Middle District of Tennessee, Nashville Division:

Please prepare forthwith a certified transcript of the record in the above entitled cause for the appeal of the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and The Nash-

ville, Chattanooga & St. Louis Railway, intervenors, from the order and decree of the Court in the above mentioned cause, made and entered April 24, 1922, which record is to consist of the following:

1. Verified bill of complaint or petition with affidavit of A. A. Taylor, Esquire, Governor of the State of Tennessee, together with Exhibits A and B and endorsements showing service on respondent the United States.

76 2. Motion of the United States to dismiss the petition.

3. The State's motion to set the Government's motion to dismiss for hearing before three Federal Judges.

4. Entry of appearance by the Interstate Commerce Commission and order permitting the same.

5. Order fixing date for hearing the motion to dismiss.

6. Answer of the Interstate Commerce Commission, omitting Exhibit A thereto, which is the same as Exhibit B to the original bill of complaint.

7. Order permitting the Illinois Central Railroad Company, the Louisville & Nashville Railroad Company and The Nashville, Chattanooga & St. Louis Railway to intervene as parties respondent.

8. Order permitting said three intervening carriers to adopt as their own the motion filed by the Government to dismiss the bill of complaint.

9. Opinion of the Court.

10. Final decree.

11. Petition for appeal, order granting same, together with assignments of error filed therewith.

12. Citation on appeal and acknowledgment of service thereof.

13. Appeal bond.

14. The evidence to be included in the record as prepared and stated by appellants lodged in the Clerk's office at the time of filing the præcipe under Equity Rule No. 75B, together with the agreement of counsel.

15. This præcipe and the acknowledgment by appellees' counsel of receipt of copy thereof and written agreement that it includes the portions of the record necessary to be incorporated into the transcript on intervenors' appeal.

May 20, 1922.

JOHN BELL KEEBLE,
CHAS. N. BURCH,
FITZGERALD HALL,
Attorneys for Intervening Carriers.

The original complainants or petitioners, appellees, hereby acknowledge the receipt of copy of the foregoing præcipe and ee that it indicates and includes all the portions of the record neces- to be incorporated into the transcript of intervenors' appeal rein referred to.

This May 20, 1922.

WM. H. SWIGGART, JR.,
Assistant Attorney General of the State of Tennessee and Attorney for Complainants, now Appellees.

Filed in the Clerk's Office, May 20, 1922.

H. M. DOAK,
Clerk of the United States District Court for the Middle District of Tenn., Nashville Division,
By C. T. VESTER,
D. C.

UNITED STATES OF AMERICA,
Middle District of Tennessee,
Nashville Division:

I, H. M. Doak, Clerk of the District Court of the United States, and for the said District, do hereby certify that the foregoing is a ue, full, correct and complete transcript of the record as indicated d called for by the præcipe on appeal filed by the intervening de- ndants Nashville, Chattanooga and St. Louis Railway, et al. in the se of State of Tennessee, the Railroad and Public Utilities Com- ission of Tennessee, etc., against the United States, as the same ap- ears and remains on file and of record in my office in Nashville.

Witness my hand and the seal of the said Court, this the 20th day f May, 1922.

[Seal of District Court of the U. S., Middle District, Tenn.]

H. M. DOAK,
Clerk.
By C. T. VESTER,
Deputy Clerk.

79 In the District Court of the United States for the Middle District of Tennessee, Nashville Division.

In Equity.

No. 3604.

THE STATE OF TENNESSEE, THE RAILROAD AND PUBLIC UTILITIES Commission of Tennessee, and The State of Tennessee on Relation of the Railroad and Public Utilities Commission of Tennessee, Petitioners,

versus

THE UNITED STATES Respondent.

On motion of Charles N. Burch, John Bell Keeble and Fitzgerald Hall, Esquires, solicitors and counsel for appellant carriers, it is hereby ordered that appeal to the Supreme Court of the United States from the order and decree heretofore on April 24th, 1922 entered and filed in this cause in the United States District Court Middle District of Tennessee, Nashville Division, be and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal for appellant carriers, to wit, the Illinois Central Railroad Company, the Louisville & Nashville Railroad Company and The Nashville, Chattanooga & St. Louis Railway shall be fixed in the sum of Two Hundred and Fifty Dollars; and said bond having been given by said appellants is approved.

80 This May 20, 1922.

EDWARD T. SANFORD,
United States District Judge,
Middle District of Tennessee.

Filed in the Clerk's Office, United States District Court, Middle District of Tenn., Nashville Division, May 20, 1922.

H. M. DOAK,
Clerk U. S. Dist. Court,
By N. T. ARNETT,
D. C.

[Endorsed:] Filed May 20, 1922. H. M. Doak, Clk., by N. T. Arnett, D. C.

81 In the District Court of the United States for the Middle District of Tennessee, Nashville Division.

No. 3604.

THE STATE OF TENNESSEE, THE RAILROAD AND PUBLIC UTILITIES Commission of Tennessee, and The State of Tennessee on Relation of the Railroad and Public Utilities Commission of Tennessee, Petitioners,

vs.

THE UNITED STATES Respondent.

Citation on Appeal.

To the State of Tennessee, B. A. Enloe, Harvey H. Hannah, Julian H. Campbell, Esquires, members of and constituting the Railroad and Public Utilities Commission of the State of Tennessee; Alfred A. Taylor and Frank M. Thompson, Esquires, Governor and Attorney General respectively of the State of Tennessee, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at the City of Washington in the District of Columbia within thirty days from the date hereof, pursuant to an order allowing appeal filed and entered in the office of the Clerk of the District Court of the United States for the
82 Middle District of Tennessee, Nashville Division, from the order and decree of said Court, signed, filed and entered on the 24th day of April, 1922, in that certain suit being in equity No. 3604 wherein the State of Tennessee, Railroad & Public Utilities Commission of Tennessee and the State of Tennessee, on relation of the Railroad & Public Utilities Commission of Tennessee, are petitioners or complainants, now appellees, and the United States is respondent, and the Interstate Commerce Commission, Louisville & Nashville Railroad Company, Illinois Central Railroad Company and The Nashville, Chattanooga & St. Louis Railway are intervenors to show cause, if any there be, why the order and decree rendered against said respondent, the United States, as in said order allowing appeal mentioned should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Edward T. Sanford, Judge of the United States District Court for the Middle District of Tennessee, Nashville Division, this 20th day of May, 1922.

EDWARD T. SANFORD,
United States District Judge for the Middle District of Tennessee.

Filed in the office of the Clerk of the United States District Court for the Middle District of Tennessee, Nashville Division, on May 20, 1922.

H. M. DOAK,
U. S. Dist. Ct. Clerk,
By N. T. ARNETT,
D. C.

Due and legal service of the within citation is hereby acknowledged, copy received and further service and notice waived. Copy of petition for appeal, order allowing appeal and assignments of error also received and accepted, this 20 day of May, 1922.

WM. H. SWIGGART, JR.,
Assistant Attorney General of the State of Tennessee and Attorney for Complainants and Appellees.

[Endorsed:] Filed May 20, 1922. H. M. Doak, Clk., by N. T. Arnett, D. C.

Endorsed on cover: File No. 28,943. M. Tennessee D. C. U. S. Term No. 988. The Nashville, Chattanooga & St. Louis Railway, Illinois Central Railroad Company, and Louisville & Nashville Railroad Company, appellants, vs. The State of Tennessee, B. A. Enloe, Harvey H. Hannah, Julian H. Campbell, members of and constituting the Railroad and Public Utilities Commission of the State of Tennessee, et al., &c. Filed May 23, 1922. File No. 28,943.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1922.

No. 429.

THE UNITED STATES, APPELLANT,

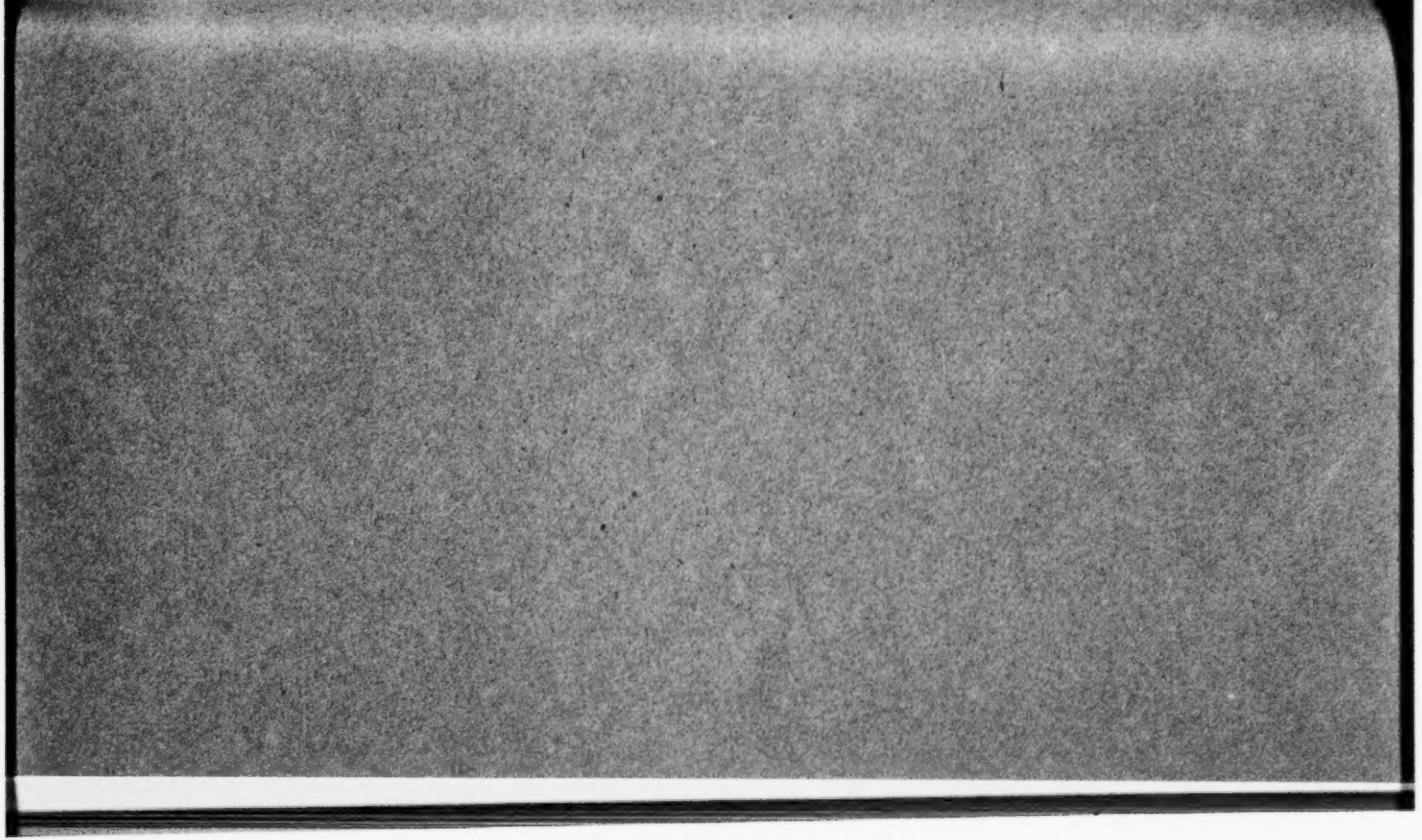
vs.

THE STATE OF TENNESSEE, THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

FILED JUNE 13, 1922.

(28979)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 429.

THE UNITED STATES, APPELLANT,

vs.

THE STATE OF TENNESSEE, THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, ETC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

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93 United States District Court, Middle District of Tennessee, Nashville Division.

THE STATE OF TENNESSEE; THE RAILROAD AND Public Utilities Commission of Tennessee, composed of B. A. Enloe (chairman), Harvey H. Hannah, and Julian H. Campbell, commissioners; and The State of Tennessee, on Relation of the Railroad and Public Utilities Commission of Tennessee, petitioners, *v.* UNITED STATES OF AMERICA, RESPONDENT, and INTERSTATE COMMERCE COMMISSION, INTERVENING respondent.	In Equity, No. 83.

Petition for appeal.

(Filed May 13, 1922.)

United States of America, respondent, and Interstate Commerce Commission, intervening respondent, feeling themselves aggrieved by the final order or decree of the District Court entered April 24, 1922, pray an appeal therefrom to the Supreme Court of the United States.

The particulars wherein the respondent and intervening respondent consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

94 And the respondent and the intervening respondent pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

LEE DOUGLAS,
United States Attorney, Middle District of Tennessee.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
P. J. FARRELL,
J. CARTER FORT,
Solicitor for Interstate Commerce Commission.

95 United States District Court, Middle District of Tennessee, Nashville Division.

Assignment of errors.

(Filed May 13, 1922.)

United States of America, respondent, and Interstate Commerce Commission, intervening respondents; now come, by their respective counsel, and in connection with their petition for appeal, file the fol-

lowing assignment of errors on which they will rely on their app to the Supreme Court of the United States from the final order decree of the District Court entered April 24, 1922, in the abo entitled cause.

The District Court erred:

I. In overruling the motion of the United States to dismiss petition and in not sustaining the motion.

II. In overruling the motion of the Interstate Commerce Co mission to dismiss the petition and in not sustaining the motion.

III. In not holding and adjudging that the Interstate Comme Commission on the record of the evidence and proceedings before had the power and authority to make and enter the order: that order rested on substantial evidence and that the qu
96 tions sought to be raised by the petition were foreclosed by findings of fact.

IV. In holding and adjudging as follows:

"Being thus convinced that the State, with or without the su port of the State commission's order, has a right to be heard as to substance of its complaint, we pass to the meritorious question."

V. In holding and adjudging as follows:

"If there had been no order by the State commission and section 22 has the scope and effect now claimed for it, the State a its municipalities would have the right to negotiate with the ra roads for the preferential treatment which section 22 contempla and to obtain such discrimination in their favor if they could. T Interstate Commerce Commission order now attacked denies th right and forbids the railroads to grant such a preference if th should wish to. It can not be controlling that at present they do n so desire; they may change their minds; and this order would sta as a deterrent both against a change of policy by the railroads ge erally and against a tendency by any one of them to break aw from the existing policy of all."

VI. In holding and adjudging as follows:

"It is the contention of the United States that when these thr sections are read together, section 22 is so modified by sections 2 a 3 that it remains for the commission to decide whether a preferen which might arise under section 22, nevertheless might involve th previously forbidden discrimination or advantage. We can not gi this construction."

VII. In holding and adjudging as follows:

"In Interstate Commerce Commission vs. Baltimore & Ohio Ra road Company, 145 U. S. 263, 278, section 22 was under considerati and it was expressly said that even in the absence of this section fr or reduced transportation for the property of the United Stat or States or municipal governments would not necessarily be an u just discrimination. This is obvious if for no other reason than b cause freight charges which are paid by the public must be in one wa or another assessed back against the public, including the railroad in the form of taxes, as well as because transportation for the publ may be exacted in partial consideration for the public rights which th

carrier has received. It can not be thought that transportation furnished to private shippers and that furnished to the public are given under substantially similar circumstances and conditions. Hence it can not necessarily follow that every discrimination is unjust. We think it should be inferred that section 22 is a legislative declaration of the fact recognized in the case just cited, and that
97 its effect is to leave the commission without jurisdiction to forbid the railroads from carrying freight for the public at a less price than it charges individuals for the same carriage of the same freight; in other words, it excludes this particular traffic from the rate structure which the commission is authorized to erect and control: in still other words, there is freedom of discrimination."

VIII. In holding and adjudging as follows:

"Of course this giving of a preference under section 22 is wholly permissive; the section does not confer upon any municipality the right to demand a preference. Nevertheless, the existence of the power is of value to the municipalities. They thereby get the right to competition in rates among the carriers for this traffic. The carriers at present do not wish to compete in this particular, but any order which prevents them from so doing whenever they may desire to operates directly to prejudice and destroy the municipal right which is recognized and preserved by section 22."

IX. In holding and adjudging as follows:

"What has so far been said leads to the conclusion that the Interstate Commerce Commission would be without authority to make an order applicable solely to interstate traffic and forbidding a preferential rate to a State or a city or county. The right of this commission to regulate or fix an intrastate rate, whether arising under the former laws or under the transportation act of 1920, is collateral and incidental to its rights to regulate interstate traffic; the branch may overhang the intrastate field only because the branch is essential to the maintenance of the tree planted in interstate soil. The incident can not exist without the principal fact to which it is collateral; the branch can not keep its position if there is no tree."

X. In holding and adjudging as follows:

"We think the Interstate Commission order should be enjoined and the State commission order should remain in force. Manifestly this result should follow only so far as the freight in question is to be carried 'for the United States, State, or municipal Governments.'"

XI. In entering the following decree, viz:

"2. That the order of the Interstate Commerce Commission in the matter of intrastate rates and charges in the State of Tennessee entered August 3, 1921, and identified on the docket of said commission as No. 12132, directing steam railroad companies to establish, put in force, and maintain rates for the transportation within the State of Tennessee of stone and gravel, in carloads, when
98 for use in the construction of public highways and consigned to Federal, State, county, or municipal authorities or their bona fide agents, in excess of rates charged by said companies on such transportation at and prior to the time of the entry of said

order, is adjudged to be void to the extent that the rates there ordered to be established, put in force, and maintained affect apply to such transportation, for the United States, State, or munic pal Government of stone and gravel, the title to which has pass to the Government or is vested in it at the point of the origin its transportation; and that to the extent that said order of the Inte state Commere Commission is hereinabove adjudged to be void, an to that extent only, it be and hereby is annulled and set aside, an the enforcement thereof be and hereby is perpetually enjoined."

XII. In entering the final decree and in not dismissing th petition.

Wherefore, respondents, and each of them, pray that the fina order or decree of the District Court, entered April 24, 1922, be re versed, annulled, and set aside, with directions that the permanen injunction shall be dissolved and the petition dismissed, and for suc other and further order as may be appropriate.

LEE DOUGLAS,
United States Attorney, Middle District of Tennessee.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
P. J. FARRELL,
J. CARTER FORT,
Solicitors for Interstate Commerce Commission.

99 United States District Court, Middle District of Tennesse

Nashville Division.

Order Allowing Appeal.

(Filed May 19, 1922.)

In the above-entitled cause, United States of America, respondent and Interstate Commerce Commission, intervening respondent, hav ing made and filed their petition praying an appeal to the Supreme Court of the United States from the final order or decree of the Dis trict Court, entered April 24, 1922, and having also made and filed a assignment of errors, and having in all respects conformed to th statute and rules of court in such case made and provided:

100 It is ordered and decreed that the appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof, and the clerk is directed to trans mit forthwith a properly authenticated transcript of the record proceedings, and papers on which said order or decree was made and entered forthwith to the Supreme Court of the United States.

A. C. DENISON,
United States Circuit Judge.
EDWARD T. SANFORD,
J. W. ROSS,
United States District Judges.

101 *Praecipe for record.*

(Filed May, 1922.)

In U. S. District Court.

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of the United States of America and the Interstate Commerce Commission and include therein, in the order given below, the following:

1. Petition.
2. Motion of the United States to dismiss.
3. Answer of the Interstate Commerce Commission and motion to dismiss included therein.
4. Motion for hearing and order fixing February 18, 1922.
5. Petition of Illinois Central Railroad Company and two other railroad companies to intervene, and their motion to adopt as their own the motions to dismiss filed by the United States.
6. Order granting petition to intervene.
7. Order of submission of cause.
8. Opinion.
9. Decree.
10. Petition for appeal.
11. Assignment of errors.
12. Order allowing appeal..
13. Praecipe.
14. Citation.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
P. J. FARRELL,
J. CARTER FORT,
Solicitors for Interstate Commerce Commission.

Service of a copy of the foregoing praecipe is hereby acknowledged this 19th day of May, A. D. 1922.

WM. H. SWIGGART, JR.,
Solicitor for Complainant and Appellees.

102 *Citation of appeal.*

In United States District Court.

UNITED STATES OF AMERICA, *ss*:

To the State of Tennessee, the Railroad and Public Utilities Commission of Tennessee, composed of B. A. Enloe, Chairman, Harvey H. Hannah and Julian H. Campbell, Commissioners, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court,

Middle District of Tennessee, wherein United States of Americ Interstate Commerce Commission are appellants and yo appellees, to show cause, if any there be, why the final or decree annulling and enjoining the order of the Interstate Com Commission entered against the appellants in the appeal men should not be corrected and why speedy justice should not be to the parties in that behalf.

Witness the Honorable A. C. Denison, United States C judge, the Honorable Edward T. Sanford and the Honorable Ross, United States District judges, this the ——— day of 1922.

United States Circuit Ju
EDWARD T. SANFORD.
J. W. ROSS.

Service of a copy of the within citation is hereby admitte acknowledged this 19 day of May, 1922.

WM. H. SWIGGART, JR.,
Solicitors for Appell

103 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Middle District of Tennessee.

I, H. M. Doak, clerk of the District Court of the United S in and for the Middle District of Tennessee, do hereby certify the foregoing is a true, full, and complete transcript of the rec the cause of the State of Tennessee et al. versus United Sta al., No. 88, Equity, as called for in the "praecipt" on appeal on behalf of the United States, and as the same appears and re on file, and of record in my office.

Witness my hand and official seal, this the 2nd day of June, and of the Independence of the United States the 146th year.

[SEAL.] H. M. DOAK,
Cl
By C. T. VESTER,
Deputy Cl

104 *Citation on appeal.*

In U. S. District Court.

UNITED STATES OF AMERICA, *ss:*

To the State of Tennesse; the Railroad and Public Utilities Co sion of Tennessee, composed of B. A. Enloe, Chairman, H H. Hannah, and Julian H. Campbell, Commissioners; an State of Tennessee, on relation of the Railroad and Public Ut Commission of Tennessee, greeting:

You are hereby cited and admonished to be and appear Supreme Court of the United States, at Washington, within t

(30) days from the date hereof pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court, Middle District of Tennessee, wherein United States of America and Interstate Commerce Commission are appellants and you are appellees, to show cause, if any there be, why the final order or decree annulling and enjoining the order of the Interstate Commerce Commission entered against the appellants in the appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. C. Denison, United States Circuit Judge, the Honorable Edward T. Sanford and the Honorable J. W. Ross, United States District Judges, this 19th day of May, 1922.

A. C. DENISON,
United States Circuit Judge.
EDWARD T. SANFORD,
J. W. ROSS,
United States District Judges.

Service of a copy of the within citation is hereby admitted and acknewledged this 19th day of May, 1922.

WM. H. SWIGGART, JR.,
Solicitor for Appellees.

Pages 105 and 106.

107 In the Supreme Court of the United States,

October term, 1922.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE Commission, appellants, *v.* STATE OF TENNESSEE. } No. 429.

Directions to print.

To WILLIAM R. STANSBURY, Esq., *Clerk:*

The above-entitled appeal will be heard on Monday, April 9, 1923, with No. 396, Nashville, Chattanooga & St. Louis Railway *v.* State of Tennessee, in which the full transcript is printed. With the exception of the appeal papers the transcripts in the two appeals are the same.

In order to prevent duplication in printing, counsel for the parties in each appeal have agreed that the printed transcript in No. 396 may be used for the hearing and disposition of both appeals, with the exception of the following appeal papers in the above-entitled cause, which should be printed:

Petition of United States and Interstate Commerce Commission for appeal.

Assignment of errors.
Order allowing appeal.
Praecipe for record.
Citation.
Certificate of clerk.

The agreement of counsel for the parties is shown by attached copies of the correspondence, which need not be printed.

JAMES M. BECK,
Solicitor General.

MARCH 14, 1923.

(Indorsed on cover:) File No. 28979. D. C., U. S., Middle Tennessee. Term No. 429. The United States, appellant, *vs.* The State of Tennessee, The Railroad and Public Utilities Commission of Tennessee, etc., et al. Filed June 13th, 1922. File No. 28979.

○

Office Supreme Court, U. S.
FILED
APR 2 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 396

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY, et al.,
Appellants,
vs.
THE STATE OF TENNESSEE, et al.,
Appellees.

Appeal from the District Court of the United States for the Middle District of Tennessee.

BRIEF FOR APPELLEES.

WM. H. SWIGGART, JR.
Assistant Attorney General of Tennessee.

FRANK M. THOMPSON,
Attorney General of Tennessee,
Of Counsel.

BAIRD-WARD
NASHVILLE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 396

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, et al,

Appellants,

vs.

STATE OF TENNESSEE, et al,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

BRIEF FOR APPELLEES

Statement of the Case

The original bill or petition was filed by the State of Tennessee and its administrative department, the Railroad & Public Utilities Commission of Tennessee, against the United States, to annul and suspend an order of the Interstate Commerce Commission affecting intrastate rates on transportation of stone and gravel for use in road construction, shipped as the property of the Federal, State or Municipal Government, on the ground that the order of the Interstate Commerce Commission is in excess of the power vested in that Commission by Congress.

The order of the Interstate Commerce Commission, directed to all the common carriers by steam railroad in Ten-

nessee, ordered the establishment and maintenance of rates "for the transportation of said commodities in intrastate commerce within the State of Tennessee" exceeding the rates theretofore in effect on such transportation by approximately twenty-five per cent.

Printed Record, p. 40.

The order of the Interstate Commerce Commission was based upon a finding by that Commission that the intrastate rates on such transportation in Tennessee, theretofore maintained, had "resulted in the past and will result in the future in lower rates on those commodities than the corresponding interstate rates between points in Tennessee and points in adjoining states and in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining states; in undue preference to persons and localities in Tennessee; and in unjust discrimination against interstate commerce."

Printed Record, pp. 38-39.

The "findings" of the Interstate Commerce Commission, and its printed report filed in support of its findings, show that the order of the Commission was based alone upon a finding that the relation of intrastate rates to interstate rates resulted in discrimination against certain persons and localities "in adjoining states"; and that the unjust discrimination against interstate commerce referred to in the findings of the Interstate Commerce Commission consisted alone of such discrimination against persons and localities in states adjoining Tennessee.

There was no finding by the Interstate Commerce Commission that the rates on the intrastate transportation described in the order were so low as to prevent intrastate commerce in Tennessee from contributing its proper proportionate share of the operating expenses and earnings of common carriers by steam railroad in Tennessee.

There was no finding by the Interstate Commerce Commission that the intrastate rates fixed by the Tennessee Commission do not afford the carriers adequate compensation for their services in such transportation.

The findings of the Interstate Commerce Commission were only that intrastate rates on shipments of stone and gravel for use in the construction of highways, consigned to the Federal, state or municipal governments, or their bona fide agents, in their relation to interstate rates on the same character of transportation from points in adjoining states to points within the State of Tennessee, unduly preferred and favored shippers and localities in Tennessee to the prejudice of shippers and localities in such adjoining states.

The Interstate Commerce Commission was without power to make and enforce such an order, because:

1. The preference accruing to governmental shippers found to exist by the Interstate Commerce Commission is expressly permitted by the Interstate Commerce Act of Congress, and is therefore not unlawful nor undue.

2. The power of the Interstate Commerce Commission to adjust and change rates of the common carriers for the purpose of removing a preference is confined to cases wherein the preference found to exist is an unlawful and therefore an undue or unreasonable preference.

3. The finding of the Interstate Commission, that preference resulted to governmental shippers in Tennessee from the relation of intrastate rates to interstate rates, was based alone upon a comparison of maximum intrastate rates with a published schedule of interstate rates which the carriers serving points in Tennessee were and are at liberty to disregard, by carrying the commodities described in the order for such shippers at lower rates, through secret agreements with such shippers authorized by Congress and

by the published regulations of the Interstate Commerce Commission; and therefore, the finding of the Interstate Commerce Commission is not a finding of a real and existing preference sufficient to authorize an order of the Interstate Commerce Commission directing carriers in Tennessee to put in force and maintain increased rates on such transportation wholly within the State of Tennessee.

4. The Interstate Commerce Commission did not find that the lower intrastate rates on governmental shipments of stone and gravel in Tennessee resulted in the failure of intrastate traffic to earn its proportion of the operating expenses and earnings of common carriers in Tennessee, volume of traffic and tariff revenue not being considered by the Interstate Commerce Commission. The order of the Commission was based entirely upon a finding that the relation of the intrastate rates to the interstate rates resulted in preference to shippers and localities in Tennessee to the prejudice of shippers and localities in adjoining states. To remove such discrimination, the order of the Interstate Commerce Commission directed carriers in Tennessee to put in force and maintain increased rates on intrastate traffic throughout the State of Tennessee. Such an order, extending throughout the State, is not supported and can not be sustained by a finding of discriminations against persons or places alone.

The intrastate rates on governmental shipments of stone and gravel for highway purposes which the Interstate Commerce Commission ordered to be increased were the result of an order made by the Railroad & Public Utilities Commission of Tennessee on November 19, 1920, restraining railroads in Tennessee from advancing or increasing their rates and charges on such shipments in Tennessee above rates and charges in effect on such commodities prior to such order.

Printed Record, p. 14.

It is contended by appellants, the Railroad Companies, that the order of the Interstate Commerce Commission can not be successfully attacked in this case because it appears from the record that the rates on the transportation affected, under the order of the Tennessee Commission, were unreasonably low and therefore confiscatory; and that the effect of the refusal of the Tennessee Commission to permit the desired increase in the intrastate rates was to require the carriers affected to grant to governmental shippers in Tennessee a preference by carrying their property at rates less than reasonably compensatory rates, in all of which appellants claim the Tennessee Commission exceeded its lawful authority.

Appellees contend that the validity of the order of the Railroad and Public Utilities Commission of Tennessee is not material to the issues of this case. The Interstate Commerce Commission has no power to act directly upon intrastate rates, save upon a finding that such action is necessary to remove an undue and unlawful prejudice against persons or localities in interstate commerce, or an undue prejudice and discrimination against interstate commerce generally, which latter power was vested in the Interstate Commerce Commission for the first time by the Act of Congress known and referred to as the Transportation Act of 1920. The finding of the Interstate Commerce Commission upon which the order involved in this case was made was only that the lower schedule or level of intrastate rates resulted in undue preference to persons and localities adjoining Tennessee. If such undue and unlawful discrimination existed at the date of the order, the Interstate Commerce Commission had power and authority to make and enforce its order, regardless of whether the lower level of intrastate rates was the result of voluntary action on the part of the carriers or obedience by them to an order of the Tennessee Commission which that Commission was without authority to make. If

such undue discrimination did not exist, the condition precedent to the power of the Interstate Commerce Commission to invade the realm of purely intrastate rates and traffic was non-existent, and the order of the Interstate Commerce Commission was without authority and void.

Appellees further contend however that the order of the Tennessee Commission was a valid exercise of its statutory authority, and is not subject to successful attack by the carriers or other appellants in this case.

THE PLEADINGS; AND THE PROCEEDINGS IN THE DISTRICT COURT.

The final hearing in the District Court was upon a motion filed by the United States to dismiss the bill. The intervening defendants, the Interstate Commerce Commission, the Nashville, Chattanooga & St. Louis Railway, the Illinois Central Railroad Company, and the Louisville & Nashville Railroad Company, were permitted to adopt the motion to dismiss filed by the United States. The Interstate Commerce Commission filed an answer, but on the hearing of the motion to dismiss, counsel for the Commission agreed that the answer was intended to raise no issue of fact, and consented to a final hearing on the motion to dismiss the bill.

Opinion of District Court, Printed Record, p. 47.
Decree of District Court, Printed Record, p. 52.

The decree of the District Court was that the order of the Interstate Commerce Commission described in the bill,

> "Is adjudged to be void to the extent that the rates therein ordered to be established, put in force and maintained affect or apply to such transportation, for the United States, State or Municipal governments, of stone and gravel, the title to which has passed to the government or is vested in it at the point of the origin of its transportation; and that to the extent that said order of the Interstate Commerce Commission is hereinabove adjudged to be void, and to that extent only, it be and hereby is annulled and set aside, and that the enforcement thereof be and hereby is perpetually enjoined."
>
> Printed Record, p. 52.

The assignments or specifications of error made by the appellants in this Court do not attack the right of appellees to maintain the suit; and the averments of the original bill setting out the facts entitling appellees to maintain the suit need not therefore be repeated here. They are set out in paragraphs 1 and 2 of the bill.

Printed Record, pp. 1-2.

The bill avers that following the order of the Interstate Commerce Commission known as Ex Parte 74, made July 20, 1920, directing a general increase of 25 per cent in all interstate freight transportation rates and charges, the Railroad and Public Utilities Commission of Tennessee permitted proportionate advances in intrastate freight transportation rates in Tennessee, with certain exceptions. The exceptions consisted of rates on brick, sewer pipe, fertilizer and fertilizer material, and the rates involved in this case, on shipments moving over the rails of ten specified carriers, including the appellants herein. With respect to the rates involved in this case the order of the Tennessee Commission provided:

> "That on car load shipments of stone and gravel moving intrastate between points in Tennessee, when for use in building public highways and consigned to Federal, State, County or Municipal authorities, or their bona fide agents, that carriers respondent hereto shall make no advance in the rates and charges over and above those in effect immediately prior to the effective date of the original suspension on these commodities, and
>
> "It is further ordered, That this order shall continue in effect for a period of not less than two years from date when it shall take effect, unless otherwise ordered by this Commission."
>
> Printed Record, pp. 3-4.

The bill then avers that, in December, 1920, certain railroad companies doing business in Tennessee, including appellants, by petition, caused an investigation to be made by the Interstate Commerce Commission with regard to the relation of the intrastate rates which were not advanced to the interstate rates on the same commodities put in force and maintained pursuant to the order in Ex Parte 74; and after investigation and upon consideration of briefs of interested parties, the Interstate Commerce Commission announced its finding that the intrastate rates on common brick and sewer pipe, which were not increased, were not

shown to create any undue or any unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, and persons and localities in interstate commerce, nor any undue or unreasonable or unjust discrimination against interstate commerce.

Original Bill, Printed Record, pp. 4-5

The bill then sets out the findings and the order of the Interstate Commerce Commission with regard to the governmental shipments of stone and gravel which are involved in this case. The order of the Railroad and Public Utilities Commission of Tennessee was made an exhibit to the bill; and the entire report, findings and order of the Interstate Commerce Commission were also made exhibits to the bill, and are copied into the printed record.

The State of Tennessee avers, in paragraph 2 of the bill, that the enforcement of the order of the Interstate Commerce Commission will require the payment from its treasury, and from the treasuries of its various subdivisions, as well as from the Treasury of the United States, large sums of money in freight charges on material purchased by them, for use in the construction of roads and highways in Tennessee, greatly in excess of the amounts required to be paid for such freight rates on the lower level as fixed by the Tennessee Commission. The interest of the State in the lower level of rates as a shipper is thus specifically averred, and is not controverted.

Printed Record, pp. 2-3.

Paragraph IV of the bill avers the invalidity of the order of the Interstate Commerce Commission, as in excess of its power, on the grounds that the prejudice and discrimination found by the Commission to exist were expressly permitted by Section 22 of the Interstate Commerce Act, and were therefore not unlawful; and that the findings of the Commission do not show a real discrimination against in-

terstate commerce; wherefore, the bill avers that the order of the Interstate Commerce Commission is an unwarranted and unauthorized interference with the reserved powers of the State of Tennessee in the control of purely intrastate transportation by common carriers.

Printed Record, pp. 7-10.

The prayer of the bill is that the order of the Interstate Commerce Commission be declared null and void as in excess of the power and authority conferred upon the Interstate Commerce Commission by Congress, and that said order be enjoined, set aside, annulled and suspended, valid and binding upon no one from the date of its promulgation and publication by the Interstate Commerce Commission. The bill also prays for general relief.

Printed Record, pp. 10-11.

The District Court, in a written opinion set out in full in the printed record, held that the appellee, the State of Tennessee, with or without the support of the order of the Railroad and Public Utilities Commission of Tennessee, has a right to be heard as to the substance of its complaint.

Printed Record p. 50.

Construing Section 22 of the Interstate Commerce Act, which provides that nothing therein shall prevent the carriage, storage or handling of property free or at reduced rates for the United States, State or Municipal governments, the District Court held that its effect was to leave the Interstate Commerce Commission without jurisdiction to forbid railroads from carrying freight for the public at a less price than it charges individuals for the same carriage of the same freight, excluding "this particular traffic from the rate structure which the Commission is authorized to erect and control; in still other words, there is freedom of discrimination."

Printed Record, pp. 50-51.

The District Court held that the order of the Interstate Commerce Commission deprived carriers in Tennessee of the right, expressly granted by the Act of Congress, to carry the property of a governmental shipper at lower rates than required of individuals. The District Court held that the existence of this power in the carriers to grant them a preference is of value to governmental shippers, regardless of whether, at the time of the order of the Interstate Commerce Commission, the carriers desired to grant such preference to governmental shippers or not.

Printed Record, p. 51.

Holding that the Interstate Commerce Commission is without authority to make an order applicable solely to interstate traffic, forbidding a preferential rate to a state, city or county, the District Court then held that the Interstate Commerce Commission was likewise without power to make such an order applicable to intrastate commerce.

Printed Record p. 57.

In order to make it certain that governmental shippers and no others should obtain the benefit of such lower rates, the decree of the District Court suspended and annulled the order of the Interstate Commerce Commission only to the extent that the rates therein ordered to be established and maintained affect or apply to transportation of the commodities named for the United States, State or Municipal governments, the title to which has passed to the government or is vested in it at the point of the origin of the transportation.

Printed Record, p. 52.

The decree of the District Court is sustained on the record and should be affirmed.

BRIEF OF THE ARGUMENT.

I.

The Interstate Commission Found Discrimination Against Persons and Places Alone.

The Interstate Commerce Commission did not find that the maintenance of the schedule of rates on governmental shipments of stone and gravel for use in the construction of highways in Tennessee would result in the failure of intrastate traffic in Tennessee to yield its proportionate share of the operating expenses and earnings of interstate carriers operating in Tennessee.

This is indicated by the fact that, although the general schedule of intrastate freight transportation rates in Tennessee were increased proportionately to the increase in interstate rates resulting from the order of the Interstate Commerce Commission in Ex Parte 74, that Commission did not find that the failure of the Tennessee Commission to permit such increase in the intrastate rates on sewer pipe and common brick resulted in any discrimination against interstate commerce.

Exhibit "B" to Bill; Printed Record, p. 38.

The only reference in the report of the Interstate Commerce Commission to the amount of revenue which the intrastate traffic in Tennessee on governmental shipments of stone and gravel produced or would produce, under either schedule of rates, is contained in the following language:

> "From figures based on actual movements of stone and gravel during the year ended September 30, 1920, respondents estimate that the refusal of the Tennessee Commission to permit the increases in rates on those commodities when used for road building is costing the Louisville & Nashville, the Nashville, Chattanooga & St. Louis, and the Southern Railways, in the aggregate, about $16,445 annually."
>
> Report of Interstate Commerce Com., Printed Record, p. 38.

This purports only to state an estimate of the carriers. It is not a finding of the Interstate Commerce Commission. No reference to this estimate is made in the Commission's "Findings."

In the report of the Interstate Commerce Commission, it is also stated that the interstate rates on municipal stone and gravel between points in Tennessee and points in adjacent states are shown by numerous comparisons to be relatively just and reasonable; and that in authorizing an increase in the rates on stone and gravel for commercial purposes within the State, the Tennessee Commission "impliedly approved the general level of those rates as increased."

Printed Record, p. 38.

This is not a finding of fact by the Interstate Commerce Commission that the increased rates on municipal stone and gravel within the State of Tennessee are reasonable and just, nor that the lower schedule of rates on the same shipments within the State of Tennessee were unreasonable or unjust, or insufficient to adequately compensate the carriers for the services performed for the shippers. That question was not considered by the Interstate Commerce Commission. The volume of the traffic and the revenue produced thereby were given no consideration, nor was the cost of such transportation to the carriers considered.

Minneapolis & St. Louis R. R. Co. v. *Minnesota*, 186 U. S., 268.

Northern Pacific Ry. Co. v. *North Dakota*, 236 U. S., 601.

Norfolk & Western Ry. Co. v. *Conley*, 236 U. S., 608.

The findings of fact by the Interstate Commerce Commission recite that the relation of the schedule of intrastate rates to the increased schedule of interstate rates *"between points in Tennessee and points in adjoining states,"* (Italics

ours) has resulted in the past and will result in the future "in lower rates on those commodities than the corresponding interstate rates between points in Tennessee and points in adjoining states and in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining states; in undue preference to persons and localities in Tennessee; and in unjust discrimination against interstate commerce."

Printed Record, pp. 38-39.

Not only does the Commission thus confine its finding to a discrimination against persons and localities in interstate commerce, but it specifies that the discrimination thus found to exist is confined to persons and localities in states adjoining Tennessee.

The additional words employed by the Interstate Commerce Commission in the findings of fact; "in unjust discrimination against interstate commerce," are restricted by the preceding reference to person and localities, and are not additional findings of fact. These words are merely descriptive of the effect of the undue prejudice to persons and localities in interstate commerce in states adjoining Tennessee, as found by the Commission. In other words, the unjust discrimination against interstate commerce found by the Commission consists of the alleged prejudice to shippers and localities in states adjoining Tennessee resulting from the relation of the intrastate rates to the interstate rates.

Illinois Central R. R. Co. v. *Public Utilities Com.*, 245 U. S., 493, 508.

There is nothing in the report of the Interstate Commerce Commission filed in support of its findings to sustain any other construction of the meaning of the phrase "unjust discrimination against interstate commerce," as it is used in the "findings" of the Commission.

The report contains no such consideration of alleged revenue loss to the carriers in Tennessee from their failure to secure the desired increase in intrastate rates on municipal shipments of stone and gravel, as in the reports of the Interstate Commerce Commission in the proceedings in Wisconsin and New York rates, considered by this Court in the cases of *Railroad Commission of Wisconsin et al*, v. *C. B. & Q. Railroad Company*, and the *State of New York et al*, v. *the United States et al*, both decided February 27, 1922.

The finding of fact upon which the order involved in this suit is based is, therefore, that the failure of carriers in Tennessee to increase their intrastate rates on municipal shipments of stone and gravel has resulted in undue preference to persons and localities in Tennessee as against persons and localities engaged in interstate commerce between points in Tennessee and points in adjoining states.

II.

The Discrimination Found by the Interstate Commerce Commission is Expressly Permitted by Congress, and is Therefore Not Unlawful.

If the order of the Interstate Commerce Commission can be sustained at all, it is because of the authority vested in the Commission by Section 3, of the Interstate Commerce Act, which is as follows:

> "That it shall be unlawful for any common carrier, subject to the provisions of this Act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."
>
> 24 Statutes at Large, 380.

The power of the Interstate Commerce Commission to require the removal of unjust discrimination which is within the prohibition of the foregoing section of the Interstate Commerce Act, even though it be the result of the relation of purely intrastate rates to interstate rates, is not questioned by the appellees in this proceeding.

But it is not every preference or discrimination which is so within the power of the Interstate Commerce Commission to remove. It is only a preference which, because it is "undue or unreasonable," is declared by Congress to be unlawful, that the Interstate Commerce Commission is empowered to remove by a readjustment of rates.

Manufacturer's Railroad Co. vs. *U. S.*, 246 U. S. 456, 481;

Interstate Commerce Com., vs. *B. & O. R. R.*, 145 U. S. 263.

In *Manufacturers Railroad Company* vs. *United States*, 246 U. S. 481, The Supreme Court said:

> "It is not any and every discrimination, preference and prejudice that are denounced by the Commerce Act. Section 3 renders unlawful any '*undue or unreasonable*' preference or advantage, prejudice or disadvantage. In the same section the requirement of 'all reasonable, proper, and equal facilities for the interchange of traffic' is qualified so as not to require one carrier to give the use of its tracks or terminal facilities to another. And in the first paragraph of amended par. 15 (36 Stat. at L. 551, chap. 309, Comp. Stat. 1916, par. 8583) it is rates, regulations, or practices that, in the opinion of the Commission, are 'unjustly discriminatory, or unduly preferential or prejudicial,' etc., to which the prohibition is to be applied.
>
> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 144, 170, 42 L. ed. 414, 424, 18 Sup. Ct. Rep. 45), and upon which its decisions, made the basis of administrative orders operating in futuro, are not to be disturbed by the courts except upon a showing

that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or, for some other reason, amount to an abuse of power."

Manufacturers R. Co., vs. *United States*, 246 U. S., 481.

The Transportation Act of 1920, in paragraph 4 of Section 13, as held by the Supreme Court in *Railroad Commission of Wisconsin et al*, vs. *Chicago, Burlington & Quincy Railroad Company*, 257 U. S., 563, for the first time vested the Interstate Commerce Commission "with a direct power to remove any undue, unreasonable or unjust discrimination against interstate or foreign commerce."

In the Transportation Act of 1920 the discrimination against interstate commerce which may be removed is qualified by the phrase "undue, unreasonable or unjust"; and, as in the case of prejudice against individuals or localities in interstate commerce, it is only unjust, undue or unreasonable discrimination against interstate commerce which the Interstate Commerce Commission is empowered to remove by the section of the Transportation Act of 1920 referred to.

41 Statutes at Large, 484.

That which is expressly allowed can not be an undue, unjust or unreasonable discrimination against interstate commerce. Such discriminations only are forbidden and made unlawful.

The Transportation Act of 1920 is an amendment to the original Interstate Commerce Act, and its provisions are to be construed and enforced as a part of the original act, modified and qualified by other pertinent and relative provisions of the original act, to the same extent as Section 3 of the original Interstate Commerce Act is modified and qualified by other provisions of the same Statute.

Section 22 of the Interstate Commerce Act provides:

"That nothing in this Act shall prevent the carriage, storage or handling of property free or at reduced

rates—for the United States, State or Municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary employment in such transportation," etc.

24 Statutes at Large, 387, as amended by 25 Statutes at Large, 862;

28 Statutes at Large, 643.

This section of the Interstate Commerce Act was construed by this Court in *Interstate Commerce Commission* vs. *Baltimore & Ohio Railroad*, 145 R. R. U. S. 263, decided soon after the enactment of the Statute. In that case the general purpose of the Interstate Commerce Act was stated in accord with the understanding of that purpose which now exists, and this Court there said:

"It is not all discriminations or preferences that fall within the inhibition of the Statute; only such as are unjust or unreasonable."

Interstate Commerce Com., vs. *B. & O. R. R. Co.*, 145 U. S. 264.

The question for discussion in the case just cited was whether the inhibition against unreasonable and undue preference in interstate commerce applied to the act of a railroad company in selling a single ticket covering the transportation of ten or more persons from one place to another at a rate lower than the aggregate of the rates for individual tickets covering the transportation of the same number of persons between the same points. It was contended for the railroad company that such a group ticket was a commutation passenger ticket, a class of tickets which Section 22 of the Interstate Commerce Act provided the railroad should have the right to issue and sell. In disposing of this contention it was necessary for the Supreme Court to determine the intention of Congress in the enactment of Section 22. Construing the section in order to ascertain the will of Congress, the Supreme Court held as follows:

"The unlawfulness defined by sections 2 and 3 con-

sists either in an 'unjust discrimination' or an 'undue or unreasonable preference or advantage,' and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination, if more favorable terms were extended to them than to ordinary passengers. Such, for instance, are property of the United States, state or municipal governments; destitute and homeless persons transported free of charge by charitable societies; indigent persons transported at the expense of municipal governments; immates of soldiers' homes, etc., and ministers of religion, in favor of whom a reduction of rates had been made for many years before the passage of the Act."

Interstate Commerce Com., vs. *B. & O. R. R. Co.*, 145 U. S., 263, 276-277.

The foregoing holding of the Supreme Court was not *obiter dictum* as is contended in the brief filed in this Court by appellants. This is clearly shown by the context of the language hereinabove quoted.

The only construction to which the language of section 22 of the Interstate Commerce Act is susceptible is that the transportation by common carriers of the property of the United States, or a state or municipal government, at lower rates than individuals are required to pay for the transportation of like property, does not constitute an unreasonable or unjust or unlawful discrimination against such individual.

Carriers can not exercise the privilege of transporting governmental property "free" or at reduced rates, without discriminating in favor of governmental owners as against individual owners of similar property transported by them.

When a carrier grants a reduced rate on road stone to a

municipality, and other carriers entering the same city do not meet the reduced rate, prejudice to the owners of stone quarries located on the lines of the latter carriers will inevitably result. In such cases Congress has permitted the public interest to outweigh the interests of individuals.

To hold, therefore, that in exercising the privilege or permission granted carriers by section 22, no discrimination against other shippers or localities must result, would be to effectively destroy the permission granted by the statute.

The Interstate Commerce Commission has recognized the freedom from control in the transportation of governmental property, resulting to the carriers from the provisions of section 22. The Commission has issued Conference Rulings for the guidance of railroads and shippers, interpreting that part of Section 22 which is applicable to the transportation of governmental property, copied into the bill in this case, as follows:

> "33. Reduced Rate Transportation for Federal, State and Municipal Governments.* Under Section 22 of the Act to regulate commerce, carriers may grant reduced rates for the transportation of property for the United States or for state or municipal governments, under arrangements made directly with such government, and in which no contractor or other third person intervenes, without filing or posting the schedule of such rates with the Commission. (See rulings 36, 308e, 218, 244, 311 and 452.)"
>
> "36. Rates on shipments for the Federal government. If title to property such as postal cards, passes to the government at the point of manufacture, the carrier may agree upon a rate to be applied for transporting it for the government to another point, without filing a tariff with the Commission. But if the manufacturer under his contract is required to deliver to the government at such other point, the transportation must be under the published tariff rate. In other words, if the shipment is made directly by the government, this rate may be fixed by the carrier without posting and filing the tariff, but not otherwise. (See ruling 33, and ruling 244 rescinding ruling 65; also see

ruling 452; also *United States* v. *A. & V. Ry. Co.*, 40 I. C. C., 406.)"

"208 (e). Section 22 of the act authorizes carriers to grant free or reduced rate transportation of property for the United States, state, or municipal governments, or for charitable purposes of for exhibition at fairs or expositions. It also authoritizes free or reduced fare transportation of certain specified persons. *These special provisions and the words 'reduced rates' are construed to be special authority for carriers to depart from established tariff rates or fares;* and for such transportation as is provided for in said section 22 it is not necessary for carriers to provide tariffs or observe tariff rates or fares and regulations excepting in the issuance, sale, and use of mileage, excursion, or commutation passenger tickets, and joint interchangeable mileage tickets. As to these, the provisions of section 6 with regard to publishing, filing, posting and observing tariffs must be complied with."

Printed Record, p. 8.

At one time, in 1908 and 1909, the Interstate Commerce Commission maintained a Conference Ruling, known as No. 65, authorizing the granting of the reduced rates to traffic consigned to a governmental authority, without the limitation stated in Ruling No. 36, above quoted, that the property must be shipped as the property of the government in order to secure the benefit of a reduced rate. Subsequently Rule No. 65 was rescinded and Rule 36 reinstated, the Interstate Commerce Commission stating its reasons for such action as follows:

"Rule 65 was adopted with the idea that publication of special rates upon traffic consigned to the Government would reduce the price of various materials purchased by it for delivery at designated points by approximately the difference between the regular rate and the lower rate which carriers were willing to accept on Government business. But further consideration of the rule itself, as well as of certain transactions which were possible thereunder, convinced the Commission that restoration of its original rule was necessary to prohibit discriminations which, if not unlawful, were at least contrary to the spirit of the statute. Having reached the conclusion that it is improper to permit the benefit of special rates on Government material to

> accrue to anyone other than the Government itself, the petition herein must be denied and the complaint will there be dismissed."
>
> *Havens & Co.*, vs. *C. N. W. Ry. Co.*, 20 I. C. C. Rep., 156, 158.

In its Conference Rulings and in the quotation hereinabove made from *Havens Co.* vs. *C. N. W. Ry. Co.*, 20 I. C. C. Reports, 156, it appears that the Interstate Commerce Commission has consistently recognized that the privilege granted by section 22 of the Commerce Act, in the transportation of governmental property, is one which is contrary to the spirit and purpose of the Act in so far as the transportation of the property of individuals is concerned.

It does not follow from the construction given to section 22 of the Interstate Commerce Act by appellees, as contended by appellants, that transportation of governmental property is wholly removed from the jurisdiction and control of the Interstate Commerce Commission. In the Commission's report in *United States* v. *Alabama & Vicksburg Railway Co., et al*, 40 I. C. C. Reports 405, it was held by the Commission that it had authority to prescribe reasonable ratings for car load shipments of stamped envelopes and post cards, shipped as the property of the United States, "although the carriers and the government may agree upon some other rate." The effect of such action of the Commission, however, in fixing a reasonable rate which may be charged, was stated in its report, as in Conference Ruling 208, as follows:

> "The tariff rate or classification rating is the *maximum* which the carriers may *demand* from the government." (Italics ours)
>
> *United States* v. *Alabama & Vicksburg Ry. Co., et al*, 40 I. C. C. 405.

In the brief filed for the United States in the District Court, numerous proceedings were cited wherein the government had invoked the jurisdiction of the Interstate Com-

nerce Commission over rates and charges for the carriage f its property. In each of these cases, however, the juris- iction invoked was to declare a maximum rate which the arriers might exact from the Government for the services erformed. Appellees do not contend that the Interstate Commerce Commission may not fix a maximum interstate ate for the transportation of Governmental property. Their ontention is that the power of the Commission is limited o the determination of the maximum rate which may be harged.

The cases cited by the United States in the District Court how no other exercise of power by the Interstate Com- nerce Commission than the fixing of a maximum rate to e charged.

United States v. *N. Y. P. & H. R. R. Co.*, 15 I. C. C., 233.

United States v. *B. & O. R. Co.*, 15 I. C. C., 470.

United States v. *Adams Express Co.*, 16 I. C. C., 394.

United States v. *Denver Rio Grande*, 18 I. C. C., 7.

United States v. *Alabama & Vicksburg Ry.*, 40 I. C. C., 405.

United States v. *Union Pacific R. R. Co.*, 28 I. C. C., 518.

Boise Lumber Co. v. *Pacific & Idaho Northern Railroad Co.*, 33 I. C. C., 109.

United States v. *Sumpter Valley Ry. Co.*, 53 I. C. C., 607.

The Conference Rulings hereinabove set out regulating ransportation of governmental property are manifestly uthorized and required by section 22 of the Interstate Com- erce Act, and are not questioned by appellants. They e wholly inconsistent with any power and authority in the nterstate Commerce Commission to prevent discrimina- on and preference or advantage in the transportation of overnmental property, whether such preference accrue one governmental shipper to the prejudice of another,

or, indirectly, to one locality to the prejudice of another locality. The effect of the Conference Rulings is to deprive the Interstate Commerce Commission of all means of determining the existence of preference and discrimination in such transportation.

The prejudice and discrimination found by the Interstate Commerce Commission to exist in the relation of the rates involved herein exists, if at all, not by reason of rates put into effect by a single carrier, but by reason of the relation of rates of a number of carriers. Unless section 22 is to be construed as in the case of *Interstate Commerce Commission* v. *Baltimore and Ohio Railroad Co.*, cited above, one carrier may not transport the property of a governmental agency free or at reduced rates unless all other carriers serving the same territory grant a like pivilege and concession to the same governmental agency and other governmental agencies similarly located. The permission granted to carriers by section 22, to carry the property of a governmental agency free or at reduced rates, is not therein made to depend upon similar action by other carriers.

It is pointed out in the bill that the effect of the order of the Interstate Commerce Commission is to place intrastate shippers and localities at an unjust and unreasonable disadvantage which Congress did not contemplate or authorize, since, while the order requires intrastate rates to be maintained at the level fixed by the order, the Interstate Commerce Commission is powerless to require the interstate rates on the same character of shipments to be maintained at the same level.

Printed Record, 9-10.

Reply to this contention is made by counsel for the Interstate Commerce Commission, by referring to the proviso of the order, which declares that nothing therein shall be

construed as "authorizing any common carrier to * * * maintain a rate for the transportation of property in intrastate commerce which is greater than its corresponding rate contemporaneously in effect and applicable to the transportation of property in interstate commerce from, to, or at the same points."

Printed Record, p. 40.

Manifestly this provision of the order does not relieve the situation pointed out. It applies only to a disparity in the rates of a single common carrier, and does not apply to the case of unjust discrimination resulting to intrastate shippers from reduced rates granted by some carriers in interstate commerce, which can not be met by other carriers in intrastate commerce serving the same point of destination in Tennessee, because the order of the Interstate Commerce Commission requires the maintenance of all of their intrastate rates at a fixed level. Application to the Interstate Commerce Commission for relief in a particular case could not relieve the situation, for the reduced rates may be granted by interstate carriers by secret agreements which may be entirely concealed from the shippers injuriously affected thereby.

No instance can be pointed out wherein this Court has upheld the authority of the Interstate Commerce Commission to regulate intrastate commerce with results so unjust and prejudicial to shippers affected.

Appellees do not contend and have never contended that section 22 vests any governmental agency with power to require common carriers to transport governmental property free or at reduced rates.

The contention of the appellees on this branch of the case is only that, since Congress has declared that the carriers may by their own volition prefer governmental shippers in rates and charges for the transportation of governmental

property, any preference or prejudice which may result from the relation of rates on such transportation is not unlawful and cannot, therefore, be found by the Interstate Commerce Commission to be undue, unjust and unreasonable.

Congress has manifested no intention to authorize the Interstate Commerce Commission to exercise direct authority over commerce wholly within a state, in order to remove a discrimination created by state imposed rates, which discrimination, if created by rates voluntarily imposed by the carriers themselves, would not be unlawful, and, therefore, neither unjust nor undue.

The discrimination found by the Interstate Commerce Commission to exist in the relation of intrastate rates to interstate rates on the transportation of governmental property being a lawful discrimination, the Interstate Commerce Commission has no power to order the establishment and maintenance of a purely intrastate rate to remove it.

III.

The Discrimination Found by the Interstate Commerce Commission is Not a Real Discrimination, and Does Not Support the Order Fixing Intrastate Rates.

The Conference Rulings and the published opinion of the Interstate Commerce Commission, cited hereinabove, expressly limit the power of the Interstate Commerce Commission, under section 22 of the Commerce Act, to the fixing of a maximum rate which carriers may charge for the transportation of governmental property.

The interstate rates on the transportation of governmental property in interstate commerce between points in Tennessee and points in adjoining states are, therefore, to be considered only as maximum rates, from which the carriers, by express authority of the Interstate Commerce

Commission are permitted to depart at will, by charging and collecting lower rates and charges than those established by the order in Ex Parte 74, through secret agreements with governmental shippers not required to be disclosed to the Interstate Commerce Commission.

The Interstate Commerce Commission has confessed itself powerless to fix a legal rate for interstate shipments of governmental property, from which interstate carriers may not depart.

Such a maximum rate, from which a carrier is at liberty to depart at will, by published tariff or by secret agreement, can form no basis or measure or standard for a finding of discrimination by comparison with other published rates.

Undue prejudice and preference and discrimination between shippers can exist only by reason of the relation of rates legally fixed, to which the carriers affected are required to adhere.

In the report of the Interstate Commerce Commission, pursuant to which the order in question was made, the Commission observed: "Respondents show that they follow the *general policy* of publishing in the regular manner such municipal rates as they maintain."

Printed Record, p. 32.

The finding of the Interstate Commerce Commission of undue preference to Tennessee shippers and localities, and undue prejudice to shippers and localities in adjoining states, was therefore based upon a comparison of intrastate rates with "the general policy," voluntarily pursued by the carriers who were respondents to the proceeding before the Commission.

Such a comparison would not support a finding of preference and prejudice, even if only interstate rates were involved.

In *Louisville & Nashville Railroad Company* v. *Maxwell*, 237 U. S., 94, the Supreme Court said:

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, *but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.*" (Italics ours.)
>
> *Railroad* v. *Maxwell*, 237 U. S., p. 97.

A legal rate which can constitute a measure of discrimination is a rate which has the certainty and to which the strict adherence is required, described in the foregoing quotation. It is the certainty with which interstate carriers are compelled to adhere to their published and duly filed rates, as indicated in the foregoing quotation from *Railroad* v. *Maxwell*, which constitutes the basis of a finding of discrimination; and which was the foundation of the holding of this Court in the Shreveport rate case (*Houston E. & W. T. Ry. Co. et al.* v. *United States*, 234 U. S., 343) and other similar cases, that the Interstate Commerce Commission may order interstate carriers to make their intrastate rate structure conform to the level of their published and duly filed interstate rates, when it is shown that the two structures are related in the manner described in those cases.

It is respectfully submitted that this Court would not have upheld the Interstate Commerce Commission in its order affecting intrastate rates in the Shreveport case, if the level of interstate rates to which the intrastate rate structure was made to conform had been one from which the interstate carriers were at liberty to lawfully depart by secret agreement with interstate shippers, as in the present case.

In extending the power of the Interstate Commerce Commission to purely intrastate commerce, in order to adequately protect interstate commerce, the Supreme Court has withheld the power except in cases wherein the necessity and basis for the extension of Federal authority appeared with a high degree of certainty. In a recent case the Supreme Court said:

> "In construing the Federal statutes enacted under the power conferred by the Commerce Clause of the Constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of the State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. (Citing cases.) This being true of an Act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a State Rate Statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty."
>
> *Illinois Central R. R.* v. *Pub. Utilities Com.*, 245 U. S., 493, 510.

When it is shown that the discrimination against interstate commerce, to remove which the order of the Interstate Commerce Commission is applied to purely intrastate traffic, appears only from a comparison of published rates, from which the carriers are at liberty to depart, with maximum intrastate rates, the "high standard of certainty" is not present, and it should be held that the finding of discrimination is wholly insufficient to warrant direct interference by the Federal authority with intrastate commerce.

The Conference Rulings of the Interstate Commerce Commission, quoted hereinabove, not only authorize interstate carriers to withhold from the Commission tariffs for the transportation in interstate commerce of governmental property for governmental shippers, but authorize such carriers to depart from tariff rates and fares on such transportation filed with the Commission.

The rate actually charged and collected by the interstate

carrier for the transportation in interstate commerce of governmental property is, therefore, not a rate fixed by law, but is a rate fixed according to the will and volition of the carrier. Such a charge or rate cannot serve as the basis of an order of the Interstate Commerce Commission requiring an increase of the intrastate rate to the level of the interstate rate.

> Minn. Rate Cases (*Simpson* v. *Shepard*), 230 U. S., 352, 417.

In the Minnesota Rate Cases, the Supreme Court, after upholding the power of the State to regulate rates for transportation wholly intrastate, subject only to the exercise by Congress of its constitutional power to regulate interstate commerce, said:

> "To say that this power exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation, is to maintain the power in name while denying it in fact. It is to assert that the exercise of the legislative judgment in determining what shall be the carrier's charge for the intrastate service is itself subject to the carrier's will. But this state-wide authority controls the carrier, and is not controlled by it; and the idea that the power of the State to fix reasonable rates for its internal traffic is limited by the mere action of the carrier in laying an interstate rate to places across the State's border is foreign to our jurisprudence.
>
> "If this authority of the State be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power; that is, one which has not been exerted, but can only be found in actual exercise of Federal control in such measure as to exclude this action by the State which otherwise would clearly be within its province."
>
> Minnesota Rate Case, 230 U. S., 352, 417.

The authority of the Interstate Commerce Commission over intrastate rates on governmental property is confined to the fixing of a maximum rate, as hereinabove shown, for

the protection of the shipper. Such a maximum may or may not be the rate charged and collected and cannot, therefore, be a true measure or standard for the exercise of Federal authority over intrastate rates, based upon a finding of unjust discrimination against persons and localities in interstate commerce. The only true measure for such finding is the interstate rate actually charged and collected. The Interstate Commerce Commission is without power to ascertain the rate or charge which is collected but if it is ascertained, it is a rate fixed only by the carrier for interstate transportation, and, under the holding in the Minnesota Rate Case, cannot be the basis of a lawful order of the Interstate Commerce Commission directing that intrastate rates be fixed in accord with it.

In *Railroad Commission of Wisconsin et al.* v. *Chicago, Burlington & Quincy Railroad Co.*, decided by this Court on February 27, 1922, 257 U. S., 563, the Supreme Court concluded its opinion as follows:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate Commerce."
>
> *Railroad Comm. of Wisconsin* v. *C. B. & Q. Railroad Co.*, 257 U. S., 563.

The discrimination found to exist in the relation of rates involved in this case cannot be the "real discrimination" which this Court referred to in this quotation as the condition precedent to the exercise by the Interstate Commerce Commission of control over intrastate rates. The

principle underlying the holding in the foregoing quotations from the Minnesota Rate Cases is adhered to and repeated in this quotation from the Wisconsin case.

From the foregoing argument and authorities, appellees contend:

1. That the discrimination against interstate commerce, resulting from preference to governmental shippers and localities in Tennessee to the prejudice of shippers and localities in adjoining states, is a lawful preference, not prohibited by Congress, which the Interstate Commerce Commission is without authority to remove.

2. That the findings of fact by the Interstate Commerce Commission, upon which its order was made, were based alone upon the relation of maximum intrastate rates with maximum interstate rates, voluntarily filed and published by interstate carriers, from which they are at liberty to depart at will; from which it appears that no real discrimination was found to exist which could authorize an order of the Interstate Commerce Commission affecting purely intrastate commerce. Whatever discrimination may result from the relation of such rates is the result of a rate voluntarily fixed and charged by the interstate carrier to which the Interstate Commerce Commisison is without authority to require intrastate rates to be conformed.

IV.

The Order of the Interstate Commerce Commission Can Not Be Sustained by a Finding of Discrimination Against Persons and Places Alone.

In *Railroad Commission of Wisconsin et al.* v. *Chicago, Burlington & Quincy Railroad Co.*, decided February 27, 1922, the Supreme Court had under consideration the validity of an order of the Interstate Commerce Commission directing an increase in all intrastate passenger and bag-

gage rates and charges corresponding to the increases which the Interstate Commerce Commission had previously ordered in interstate rates, on the ground that the lower level of intrastate rates and charges created undue and unjust discrimination against interstate commerce. The order directed increases in fares "between all interior points, although neither may be near the border and the fares between them may not work a discrimination against interstate travelers at all." The Supreme Court held:

> "We cannot sustain the sweep of the order in this case on the showing of discriminations against persons or places alone."
>
> *Railroad Comm. of Wisconsin et al.* v. *C. B. & Q. Railroad Co.*, 257 U. S., 563.

In *Illinois Central Railroad Co.* v. *Public Utilities Comm.*, 245 U. S., 493, 509, the Supreme Court, quoting from *American Express Co.* v. *South Dakota*, 244 U. S., 617, said:

> "But where, as here, there is a conflict between the Federal and the State authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under State authority unless, and except so far as, it is definite as to the territory or points to which it applies. For the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic."
>
> *Illinois Central R. R. Co.* v. *Public Utilities Comm.*, 256 U. S., 493, 509.
>
> *American Express Co.* v. *South Dakota*, 244 U. S., 617.

The order in this case was based upon a finding of discrimination against persons and localities in adjoining states to Tennessee. The order directs an increase in intrastate rates between all interior points in Tennessee. The foregoing authorities clearly show that such an order based upon such a finding of discrimination was beyond the power of the Interstate Commerce Commission to make.

V.

The Order of the Tennessee Commission; Its Validity and Materiality.

The District Court found that the order of the Tennessee Commission which gave rise to the proceeding before the Interstate Commerce Commission was a valid exercise of State power, but also held that if there had been no order by the State Commission, the State and its municipalities would have the right to negotiate with the railroads for the preferential treatment authorized by section 22 of the Interstate Commerce Act, and to obtain such discrimination in their favor if they could; a right denied and forbidden by the Interstate Commerce Commission herein.

Printed Record, pp. 49-50.

It is contended by appellants that the order of the Tennessee Commission required carriers in Tennessee to transport governmental property between points in Tennessee at rates which would not afford the carriers adequate compensation for the services performed.

If this were true, the fact would not justify the order of the Interstate Commerce Commission. The proceedings upon which the order was based were manifestly instituted for the purpose of removing discrimination against interstate commerce.

> "Proceedings to remove unjust discrimination are directed only at the relation of rates. If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely."
>
> *American Express Co.* v. *South Dakota*, 244 U. S., 617, 624.

It is only a finding, supported by material evidence, that unjust discrimination exists which can justify an order of the Interstate Commerce Commission affecting purely intrastate rates.

In the Shreveport Rate Case (*Houston E. & W. T. R.*

Co. v. *U. S.*), 234 U. S., 350, 357, the Supreme Court, after quoting and construing section 3 of the Interstate Commerce Act, said:

> "Congress thus defined the scope of its regulation, and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates, and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic. Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states. This was the question recently decided by this Court in the Minnesota Rate Cases (*Simpson* v. *Shepard*), 230 U. S., 352."
>
> Shreveport Rate Case (*Houston E. & W. T. R. Co.* v. *U. S.*), 234 U. S., 357.

If the Interstate Commerce Commission had found upon evidence that the intrastate rates fixed by the Tennessee Commission were so unreasonably low as to cause intrastate commerce to fail to produce its proportionate share of the operating expenses and earnings of interstate carriers, the Interstate Commerce Commission would not have had the power to order the increase, regardless of the reason for the lower level of intrastate rates, because Congress has denied it the power to require carriers to maintain and adhere to any rate for the transportation of governmental property, either in interstate or intrastate commerce.. The Interstate Commerce Commission, however, did not find that the intrastate rates failed to produce the proper proportionate share of expenses and earnings, and in the absence of such finding certainly had no jurisdiction to make an order directing an increase of intrastate rates for the purpose of affording to the carriers adequate compensation for the particular services performed for governmental shippers in Tennessee.

In its report, the Interstate Commerce Commission said:

> "In authorizing an increase in the rates on stone

and gravel for commercial purposes the Tennessee Commission impliedly approved the general level of those rates as increased."

Printed Record, p. 38.

Approval of a general level of rates does not support a finding that a lower rate on a particular class of transportation is unjust to the carriers or insufficient to produce adequate compensation for the services performed. Volume of traffic and the circumstances under which the traffic is handled are elements which must be considered in determining whether a particular rate on a particular class of traffic is adequately compensatory.

In the brief filed in this Court for appellants, at page 34, it is stated:

> "It is common knowledge of which this Court will take judicial cognizance, that the governments, State and Federal, have entered upon a colossal road-building program. That the tremendous tonnage incident to the construction of these roads is to be withdrawn from the provisions of the Act when consigned to the government and State and their political subdivisions is unbelievable."

In making a classification for rate-making purposes of stone and gravel for use in the construction of highways, when consigned to a governmental agency, it may be presumed, in view of the foregoing statement, that the Tennessee Commission had in mind a very large tonnage of such commodity in aid of the road-building program of the State and Federal Governments.

Of the rate-making power of the Interstate Commerce Commission, the Supreme Court, in *Minneapolis & St. Louis R. R. Co.* v. *Minnesota*, 186 U. S., 268, said:

> "In exercising its power of supervising such rates the Commission is not bound to reduce the rates upon all classes of freight, which may perhaps be reasonable, except as applied to a particular article; and if, upon examining the tariffs of a certain road, the Commission is of opinion that the rate upon a particular article, or class of freight, is disproportionately or unreasonably high, it may reduce such rate, notwith-

standing that it may be impossible for the company to determine with mathematical accuracy the cost of transportation of that particular article as distinguished from all others. Obviously such a reduction could not be shown to be unreasonable simply by proving that, if applied to all classes of freight, it would result in an unreasonably low rate."

Minneapolis & St. Louis R. R. Co. v. *Minn.*, 186 U. S., 268.

In *Smyth* v. *Ames*, 169 U. S., 541, the Supreme Court said:

"Nor can the carrier justify unreasonably high rates on domestic business upon the ground that it will be able only in that way to meet losses on its interstate business. So far as rates of transportation are concerned, domestic business should not be made to bear the losses on interstate business, nor the latter the losses on domestic business. It is only rates for the transportation of persons and property between points within the state that the state can prescribe; and when it undertakes to prescribe rates not to be exceeded by the carrier, it must do so with reference exclusively to what is just and reasonable, as between the carrier and the public, in respect of domestic business."

Smyth v. *Ames*, 169 U. S., 541.

In *Northern Pacific R. R. Co.* v. *North Dakota*, 236 U. S., 601, the Supreme Court said:

"The case of *Minneapolis & St. L. R. Co.* v. *Minnesota*, 186 U. S., 257, 46 L. Ed., 1151, 22 Sup. Ct. Rep., 900, involved a rate fixed by the Railroad and Warehouse Commission of the State of Minnesota for the intrastate transportation of hard coal in carload lots. There was no proof that the carrier was compelled to transport the coal at a loss or without substantial compensation. The principal testimony, as the Court observed, was intended to show that 'if the rate fixed by the commission for coal in carload lots were applied to *all* freight, the road would not pay its operating expenses, although in making this showing the interest upon the bonded debt and the dividends were included as part of the operating expenses.' It was said that it was 'quite evident' that this testimony had 'but a slight, if any, tendency to show that even at the rates fixed by the commission there would not still be a reasonable profit upon coal so carried.'"

Northern Pacific R. R. Co. v. *North Dak.*, 236 U. S., 601.

In the case just cited the Court also referred to *Willcox* v. *Consolidated Gas Company*, 212 U. S., 19, which involved the validity of an ordinance of the City of New York fixing rates for gas supplied for general consumption in the city, and providing a lower rate for gas furnished to the city itself. The Court said:

> "It was said by the Court that the criticism of the 'wholesale' rate to the city was met by the fact that the total returns for the sale of gas were adequate. It was not established in that case that this 'wholesale' rate required a service without substantial compensation in addition to cost."
>
> *Northern Pacific R. R. Co.* v. *North Dak.*, 236 U. S., 601.

In *Norfolk & W. R. Co.* v. *Conley*, 236 U. S., 608, the Supreme Court said:

> "The fundamental question presented is whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company, separately considered. What has been said in the opinion in *Northern P. R., Co.* v. *North Dakota*, decided this day (236 U. S. 585, ante, 735, 35 Sup. Ct. Rep. 429), makes an extended discussion of this question unnecessary. It was recognized that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services."
>
> *Norfolk & W. R. Co.*, v. *Conley*, 236 U. S., 608.

The record does not show whether or not, prior to the order of the Tennessee Commission under consideration, railroads in Tennessee had filed with that Commission special tariffs for road-building material, when consigned to a governmental agency. If necessary to sustain the order of the Tennessee Commission, in the absence of proof, it should be presumed that such tariffs had been filed.

In *Pennsylvania R. R. Co.* v. *Towers*, 245 U. S., 11, cited in the opinion of the District Court herein, the Supreme

Court, after referring to the holding in *Norfolk & Western Railroad Co.*, v. *Conley*, quoted above, said:

> "Having the general authority to fix rates of a reasonable nature, we can see no good reason for denying to the state the power to exercise this authority in such manner as to fix rates for special services different from those charged for the general service. In our opinion the rate for a single fare for passengers generally may be varied so as to fit the particular and different service which involves, as do commutation rates, the disposition of tickets to passengers who have a peculiar relation to the service."
>
> *Pennsylvania R. Co.* v. *Towers*, 245 U. S., 11.

The Interstate Commerce Commission has itself recognized that stone intended for road-building purposes is of such a nature as to support a special rate for its transportation. In the Commission's report in *State of Maryland* v. *Pennsylvania Railroad Co., et al*, 30 I. C. C. Reports 22, 25, the Interstate Commerce Commission had under consideration proposed increased rates "for the transportation of Interstate shipments of crushed stone for road-making purposes." In considering the reasonableness of the proposed rate on such commodity, the Interstate Commerce Commission exercised its common knowledge, without reference to any proof in the case, by the following finding:

> "Road stone is a very low grade commodity; it loads generally about sixty thousand pounds to the car, requires only ordinary transportation equipment, and is free from claims for damage in transit."
>
> 30 I. C. C. Reports, 22, 25.

The reports of the Interstate Commerce Commission also contain another instance of the practice of making a different rate on stone for road purposes from the rate on stone for commercial purposes. In *Louisiana Rates*, 60 I. C. C., 378, the Commission stated that it was shown in argument that the Illinois Central Railroad Company, one of the appellants herein, had filed with the Commission schedules of interstate rates for transportation of "municipal sand and gravel," for streets, etc., which were lower than the

interstate rates on *commercial shipments* of sand and gravel from and to the same points.

60 I. C. C., reports 378.

With these instances of the implied approval of the Interstate Commerce Commission of the practice of making a different rate for transportation of municipal stone and gravel for road purposes from the rate between the same points on commercial shipments of stone and gravel, it can not be reasonably argued, without proof and without a finding of fact by the Commission, that the order of the Tennessee Commission was intended as a preference to governmental shippers in Tennessee and was not based upon substantial differences in the traffic affected.

Not only is the commodity in question described by the Interstate Commerce Commission as a low grade commodity, but it is conceded by appellants that the Tennessee Commission had reason to contemplate movement of a tremendous tonnage of the commodity shipped as the property of the State and Federal Governments in Tennessee. It is manifest that these conditions were such as to justify a finding by the Tennessee Commission that transportation of road stone and gravel for governmental agencies in Tennessee required a lower rate than commercial shipments of stone and gravel.

The holdings of the Supreme Court cited and quoted hereinabove show that these conditions would have justified special consideration and special rates in interstate commerce, and it is held by the Supreme Court of Tennessee that, the general purpose of the Tennessee statute being the same as the general purpose of the Interstate Commerce Act, the decisions upon the construction of the Federal statutes are authoritative upon the construction of the Tennessee statute.

New River Lumber Co. v. *Tenn. Rwy. Co.* 145 Tenn., 266, 284.

The Railroad & Public Utilities Commission of Tennessee was created by, and its duties and powers are defined by Chapter 10 of the Public Acts of 1897, as amended by Chapter 390 of the Public Acts of 1907 and Chapter 92 of the Public Acts of 1915. Neither of the amendatory acts contains provisions applicable to this case. Pertinent provisions of the original act are as follows:

"SEC. 8. *Be It Further Enacted*, That authority is hereby vested in the Railroad Commission of Tennessee, and it is hereby made its duty, to supervise and fix the rates, charges and regulations of Railroad freight and passenger tariffs and to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different Railroads in this State. The Commission shall have power to make all needed rules for its government and for its proceedings and regulate the mode and manner of all investigations and hearings of Railroad Companies, and other parties, before it, and to adopt and enforce such rules and regulations and modes of procedure as it may deem proper for the hearing and determination of all complaints made by any Railroad Company or other parties; * * * * * * *"

"SEC. 15. *Be It Further Enacted*, That if any such common carrier shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons, firm or corporation, a greater or less compensation for any services rendered in the transportation of any kind of property upon such railroads within this State than it charges, demands, collects or receives from any other person or persons, firms or corporations for doing for him or them a like service in the transportation of a like kind of property under substantially like circumstances and conditions, and if such common carriers make any preference between the parties aforesaid, in furnishing cars or motive power for the purpose aforesaid, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful.

"SEC. 16. *Be It Further Enacted*, That if any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of or the right to use

in this State, it shall be deemed guilty of extortion, which is hereby prohibited and declared unlawful.

"SEC. 17. *Be It Further Enacted*, That it shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage."

"SEC. 24. *Be It Further Enacted*, That this Act shall not prevent any Railroad Company from transporting freight free of charge, or at reduced rates, for any religious, charitable or benevolent purpose, or for any industrial exposition, fair or association of a public nature, or for transporting immigrants into this State, or persons prospecting with a view of locating or bringing immigrants into this State, or for pleasure excursions. However, nothing in this Act shall be construed so as to prevent the railroads of this State from giving special rates to encourage infant manufacturing industries, and for the encouragement of any other new business or industry, or for the transportation of any perishable goods;

That such transportation shall be furnished without discrimination, and under such rules and regulations as the Commission may prescribe."

Acts of Tennessee for 1897, Chap. 10.

Construing these sections of the Tennessee Act, the District Court held:

"By Section 8 it has power—'* * * to supervise and fix the rates * * * of railroad freight and passenger tariffs on the different railroads in this state.'

"Clearly this authority covers the action which has been here taken, unless there is restriction elsewhere in the act. Sections 15 and 17 prohibit any carrier from receiving from any person or corporation a greater or less compensation than it charges any other person or corporation for doing a like service in the transportation of like property under substantially like circumstances and conditions, and from giving any undue or unreasonable preference or advantage to any particular person or corporation or any particular description of traffic. These provisions are not direct limitations upon the power of the commission to authorize rates which do make discrimination; they rather imply the power of the commission to permit preference and

discrimination if the commission shall decide that it is not undue or unjust or that the services involved are not under like circumstances and conditions; and their utmost indirect effect is to prohibit the fixing of such discriminatory rates as are in fact undue and unjust. It is distinctly held in *Interstate Commerce Commission* vs. *Baltimore & Ohio Railroad*, 145 U. S. hereafter discussed, that a preferential rate given to the state or municipality is not necessarily unjust or undue; and it follows that sections 15 and 17 do not necessarily deprive the Commission of jurisdiction to allow such preferential rates.

"Section 24 of the Tennessee Act is somewhat similar to section 22 of the Interstate Commerce Act, and provides that the law should not prevent any railroad company from transporting freight at reduced rates for certain specified purposes, among which shipments to a state or municipality are not mentioned. However, we do not think this enumeration of permitted preferences must be taken as exclusive. Each one of the enumerated preferences involves a benefit which, if public at all, is so indirect that the right to make the preference would be doubtful unless it were specifically given. The enumeration should not be construed to exclude a case where the public benefit is as direct as it is when a state or municipality actually pays the freight. As the Supreme Court said of a similar section in 145 U. S. at page 278,—'This section is illustrative, rather than exclusive.'

"If there ever was any doubt of the right of such a commission to fix a rate for a particular service under special conditions at a figure less than the maximum allowed for such general service (*Lake Shore Railroad* vs. *Smith*, 173 U. S. 684, 693) that doubt cannot survive the decision in *Pennsylvania Railroad* vs. *Towers*, 245 U. S. 6, 17."

Printed Record, pp. 49-50.

The construction given the Tennessee statute by the District Court is obviously correct; and the citations hereinabove made of decisions of the Supreme Court show clearly that a preferential rate given to the State or a municipality is not necessarily unjust nor undue.

The District Court further held as follows:

"In *Interstate Commerce Commisison* v. *Baltimore & Ohio Railroad Company*, 145 U. S., 263, 278, Section

22 was under consideration and it was expressly said that even in the absence of this section free or reduced transportation of the property of the United States or states or municipal governments would not necessarily be an unjust discrimination. This is obvious if for no other reason than because freight charges which are paid by the public must be in one way or another assessed back against the public, including the railroad, in the form of taxes, as well as because transportation for the public may be exacted in partial consideration for the public rights which the carrier has received. *It cannot be thought that transportation furnished to private shippers and that furnished to the public are given under substantially similar circumstances and conditions.*" (Italics ours.)
Printed Record, pp. 50-51.

If any attack can be made in this case on the order of the Tennessee Commission, it is a collateral attack, and if it can be conceived that transportation of stone and gravel for a state or municipality or for the Federal government, for use in road-building purposes, can be performed under circumstances and conditions which do not attend the transportation of these commodities for idividuals for commercial purposes, then it should be presumed that the Tennessee Commission found that such difference existed in the traffic affected by its order. At least, it does not appear from the record in this case that the rate fixed by the Tennessee Commission for intrastate transportation of road stone and gravel for road-building purposes, transported for the Federal, state or municipal governments, does not afford the carrier adequate compensation for the services performed.

If the order of the Tennessee Commission should be construed as granting a preference to governmental shippers, favoring them over individual shippers in intrastate traffic, then, as found by the District Court, following the holding of the Supreme Court in *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad*, 145 U. S., 278, such a preference is necessarily neither unjust nor undue, and the Ten-

nessee Commission's order would not be void on that account. And there being no finding by the Interstate Commerce Commission that such preferential rates on governmental shipments in Tennessee resulted in the failure of intrastate traffic as a whole to yield its proportionate share of the earnings and expenses of interstate railroads in Tennessee, the fact that such preference was granted to governmental shippers could not sustain the order of the Interstate Commerce Commission.

Appellees contend, therefore, that the order of the Tennessee Commission fixing the intrastate rates in question was a valid exercise of the reserved powers of the State through its departmental agency.

But regardless of the validity of such order of the State Commission, the action of the Interstate Commerce Commission can only be sustained upon a finding that the intrastate rates resulted in an unjust and unlawful discrimination against interstate commerce, and that such discrimination was real and substantial. In the absence of such a finding, the carriers affected would be required to resort to a proceeding directly attacking the order of the State Commission to establish its invalidity, the Interstate Commerce Commission being without jurisdiction, and its order void.

In spite of all collateral questions raised by appellants, the principal question recurs. Carriers may prefer a governmental shipper in the transportation of its property. If such preference is granted to a municipality in the transportation of road stone purchased by it from a quarry served by the carrier, and other carriers serving the same municipality from other quarries do not grant the same preference, such other quarries and their owners are prejudiced. Congress has declared that, in so far as interstate commerce is concerned, such a prejudice is neither unjust nor unreasonable, and the Supreme Court has held that

this would be true regardless of the specific permission of Congress. The discrimination is therefore not unlawful, and the Interstate Commerce Commission is without power to remove it when it results from the relation of rates in interstate commerce. It is likewise without power to remove such discrimination when it results from the relation of intrastate rates to interstate rates.

The decree of the District Court was therefore correct, and should be affirmed.

Respectfully submitted,

W. H. SWIGGART, JR.,
For Appellees.

FRANK M. THOMPSON,
Of Counsel.

FILED
MAY 27 1922
WM. R. STANSB
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

No. 988 396

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE ILLINOIS CENTRAL RAILROAD COMPANY AND THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, Appellants,

vs.

Appeal from the District Court of the United States for the Middle District of Tennessee.

THE STATE OF TENNESSEE, Et Al., Appellees.

Reply of the State of Tennessee and Other Appellees to the Petition of the Louisville & Nashville Railroad Company, The Illinois Central Railroad Company, and The Nashville, Chattanooga & St. Louis Railway, for a Supersedeas, Pending Final Disposition of the Appeal.

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Assistant Attorney-General for Tennessee.

BAIRD-WARD PRINTING CO., NASHVILLE, TENN.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1921.

THE UNITED STATES, THE INTERSTATE COMMERCE COMMISSION, THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE ILLINIOS CENTRAL RAILROAD COMPANY AND THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

Appellants,

VS.

THE STATE OF TENNESSEE, ET AL.,

Appellees.

REPLY OF THE STATE OF TENNESSEE AND OTHER APPELLEES TO THE PETITION OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE ILLINOIS CENTRAL RAILROAD COMPANY AND THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, FOR A SUPERSEDEAS, PENDING FINAL DISPOSITION OF THE APPEAL

May It Please the Court:

STATEMENT OF THE CASE.

For a statement of the case, the Appellees quote from the opinion of the District Court, copied into the printed record as follows:

> "The State of Tennessee, acting both in its own behalf and upon the relation of the Railroad and Public Utilities Commission of Tennessee, joined with that commission in filing a bill of complaint directed against the United States. Since the purpose of the bill was

to enjoin the enforcement of an order made by the Interstate Commerce Commission, proceedings were had pursuant to the jurisdiction and practice fixed for the Commerce Court under Sections 207, 208 and 209 of the Judicial Code and the Act of October 22, 1913. (U. S. C. S. of 1916, Section 998.) Pursuant to the latter section, a motion for a preliminary injunction regularly came on to be heard before the court as now constituted. On such hearing the Illinois Central Railroad Company and the Nashville, Chattanooga & St. Louis Railway were permitted to intervene and to join in the motion made by the United States to dismiss the bill for lack of equity. The Interstate Commerce Commission also was permitted to and did intervene as a defendant and file its answer. Upon the hearing of the motion to dismiss, it was stated by counsel for the United States and for the intervening railroads that if the motion to dismiss were overruled, they did not desire to file any answer or further pleadings. It was also agreed between counsel for the State of Tennessee and counsel for the Interstate Commerce Commission that the latter's answer was not intended to raise any issue of fact and that the case was appropriate for final hearing on the bill and answer. It was therefore agreed by counsel for all parties that the hearing upon the motion and upon bill and answer should be treated as a final hearing, and that a final decree might be entered thereon.

"Prior to July 29, 1920, the freight rates in Tennessee and adjoining states upon broken stone, cement and similar road building materials had been established by the Interstate Commerce Commission and by the State Utilities Commission within their respective fields at the same amounts in each. On the day named the Interstate Commerce Commission by its order '*ex parte* 74' authorized an increase of 25 per cent in freight rates in this general territory in interstate traffic and the railroads here intervening adopted this increase. They also filed with the State Commission a tariff making the same proportionate advance in their intrastate rates on all traffic. This was suspended by the State Commission approved the increase as to all intrastate traffic, excepting that in road building materials consigned to the United States, or the state or municipality therein, or consigned to a contractor for such public use. As to this excepted traffic all the railroads were directed to maintain the formerly existing and lower rate.

"Thereupon the railroads applied to the Interstate Commerce Commission to have the intrastate rate on this excepted traffic fixed by that Commission so as to include the same 25 per cent advance which had been given on all interstate traffic. The railroads alleged that the order of the State Commission, which in effect, prescribed for the intrastate traffic in these fields a rate 20 per cent lower than that which had been established for the interstate shipments of the same materials, was an undue and unjust discrimination against interstate traffic. There was a full hearing before the Interstate Commerce Commission and it found that in this respect undue preference to persons and localities in Tennessee and unjust discrimination against interstate commerce did result, which should be removed by raising the intrastate rate on these articles shipped to the United States or to the state or counties or cities, to the same price charged against all shippers or consignees. This order was entered August 3, 1921, and was identified as No. 12132. This is the order, the enforcement of which this suit is brought to enjoin.

"The general power and jurisdiction of the Interstate Commerce Commission to fix an intrastate rate, as to which it had found the existence of discrimination and prejudice against interstate commerce, were not distinctly challenged by the bill; and since the hearing of the motion herein such jurisdiction and power have been definitely declared by the Supreme Court in the case of *Wisconsin* v. *United States*, decided February 27, 1922. The only question which is here for decision is one arising under Section 22 of the Interstate Commerce Act, which so far as it is here material declares:

" 'That nothing in this Act shall prevent the carriage, storage or handling of property, free or at reduced rates for the United States, state or municipal governments, * * * * * *'

"Whether the effect of this section is to deprive the Commission of jurisdiction to make an order preventing discrimination and preference in shipments for these favored parties is the controlling question."

The conclusions of the District Court were stated as follows:

"What has so far been said leads to the conclusion that the Interstate Commerce Commission would be

without authority to make an order applicable solely to interstate traffic and forbidding a preferential rate to a state or a city or county. The right of this Commission to regulate or fix an intrastate rate, whether arising under the former laws or under the Transportation Act of 1920, is collateral and incidental to its rights to regulate interstate traffic; the branch may overhang the intrastate field only because the branch is essential to the maintenance of the tree planted in interstate soil. The incident cannot exist without the principal fact to which it is collateral; the branch cannot keep its position if there is no tree. The Interstate Commission's whole power to regulate interstate commerce is modified by the exception that it may not forbid discrimination in favor of a state. Its power to control intrastate commerce is modified by the exception that it may not forbid discrimination in favor of a state. Its power to control intrastate commerce must be modified by the same exception.

"We think the Interstate Commission order should be enjoined and the State Commission order should remain in force. Manifestly this result should follow only so far as the freight in question is to be carried 'for the United States, state or municipal governments.' The preference should not be determined by the mere fact that the government is or is not shipper or consignee. Precisely the proper division seems to be made by the Interstate Commerce Commission Conference Ruling, No. 36, which permits the preference to be given only in case the title to the property passes to the government or is vested in the government at the point of the origin of its transportation. (*Havens* v. *Chicago Railway*, 20 I. C. C. 156) No other formula now occurs to us by which it can be made certain that only the government will get the benefit of the preference."

Opinion of District Court, Printed Record, p.——.

The material part of the final decree entered by the District Court provides as follows:

"That the order of the Interstate Commerce Commission in the matter of intrastate rates and charges in the State of Tennessee, entered August 3, 1921, and identified on the docket of said Commission as No. 12132, directing Steam Railroad Companies to establish, put in force and maintain rates for the transportation within the State of Tennessee of stone and gravel in carloads,

when for use in the construction of public highways and consigned to federal, state, county or municipal authorities or their *bona fide* agents, in excess of rates charged by said companies on such transporation at and prior to the time of the entry of said order, is adjudged to be void to the extent that the rates therein ordered to be established, put in force and maintained affect or apply to such transportation, for the United States, state or municipal governments, of stone and gravel, the title to which has passed to the Government or is vested in it at the point of the origin of its transportation; and that to the extent that said order of the Interstate Commerce Commission is hereinabove adjudged to be void, and to that extent only, it be and hereby is annulled and set aside, and the enforcement thereof be and hereby is perpetually enjoined."

Printed Record, p.——.

The validity of no order of the Railroad and Public Utilities Commission of Tennesee is involved in this case. While the effect of the injunctive order of the District Court is to remove the order of the Interstate Commerce Commission as a barrier to the enforcement of the State Commission's order fixing maximum rates on the intrastate traffic affected, the question here presented is one involving the power of the Interstate Commerce Commission to invade the realm of purely intrastate rates and traffic, and that power cannot be sustained or defeated according to the validity of any action of the State Commission.

However, the validity of the order of the State Commission which provoked the proceedings before the Interstate Commerce Commission, in which proceedings the order No. 12132 was made, was considered by the District Court, and on the final hearing, argument will be made showing the validity of that order under the State statutes. It is not considered necessary to go into this collateral question on this preliminary motion.

Appellees assert that the order of the Interstate Commerce Commission which the petition for *supersedeas* seeks to revive is so clearly and obviously invalid, as in excess of the power of the Interstate Commerce Commission, the

Court, in its discretion, should deny the petition for *supersedeas;* and, in addition, Appellees contend and insist that the special situation created by the application of the carriers alone for the *supersedeas* is such that the Court, sitting as a court of equity, should deny the petition.

The statute authorizing the appeal denied to the District Court the right to grant Appellants a *supersedeas*, and vested that right alone in the Supreme Court, or a Justice thereof, emphasizing the intention of Congress that the *supersedeas* should be allowed only in the exercise of the discretion of the highest court of the land.

Judicial Code, Sec. 210.

I.

THE MERITS OF THE CASE ARE SO CLEAR THAT A SUPERSEDEAS SHOULD NOT BE ALLOWED

The order of the Interstate Commerce Commission, to annul which this suit was brought, contains the following:

> "It is ordered that the common carriers by steam railroad, parties to this proceeding, (naming them . . .) according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate rates for the transportation of stone and gravel, in carloads, when for use in the construction of public highways and consigned to federal, state, county or municipal authorities, or their *bona fide* agents, and *to establish, put in force and maintain* rates for the transportation of said commodities in intrastate commere within the State of Tennessee which shall exceed the rates of said respondents for the transportation of said commodities in effect July 29, 1920, and applicable to such transportation, in amounts corresponding to the increases heretofore made by said respondents and now in effect under *Ex Parte* 74 referred to in said report, in said respondents' rates for the transportation of said commodities in interstate commerce within the State of Tennessee and between points

in the State of Tennessee and points in adjoining states."

See Exhibit "A" to Original Bill.

(The underscoring and italics in this brief are ours.)

This order was predicated upon certain alleged findings of fact by the Interstate Commerce Commission, made in a proceeding instituted by certain carriers operating within the State of Tennessee, complaining of the failure of the Railroad and Public Utilities Commission of Tennessee to authorize increases in intrastate rates on road-building material consigned to municipal agencies, including sand, gravel, brick and sewer pipe. The application of the carriers for an order from the Interstate Commerce Commission authorizing the increases in rates on brick and sewer pipe was denied, a written report of the Commission holding that the carriers had not shown that the lower schedule of rates on those commodities resulted in undue preference or prejudice against interstate commerce, although the Interstate Commerce Commission said in its written report *that the carriers estimated* that the proposed increase in the intrastate rates on brick "would add $12,800.00 a year to the revenues" of four of the railroads affected.

63 I. C. C. Rep, 167.

In the written report on the stone and gravel rates, the rates involved in this suit, the Interstate Commerce Commission also stated that theree of the carriers affected "estimated" that the refusal of the Tennessee Commission to permit the proposed increases in rates on municipal stone and gravel is costing them, in the aggregate, about $16,445.00 annually.

63 I. C. C. Rep., pp. 176, 177.
(Exhibit "A," to Original Bill.)

The Interstate Commerce Commission did not, however, make any finding of its own with regard to the difference in revenue accruing to the carriers in Tennessee on account of the failure of those carriers to increase their intrastate rates on municipal stone and gravel in the same proportion that interstate rates were increased by virtue of the order

in *Ex Parte* 74. Only an estimate of three of the carriers affected was stated, in passing.

The order of the Interstate Commerce Commission on the stone and gravel rates was based upon a finding by the Commission that the failure of the carriers in Tennessee to increase their rates on municipal stone and gravel, intrastate, "has resulted in the past and will result in the future in lower rates on those commodities than the corresponding interstate rates between points in Tennessee and points in adjoining states, and in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining states; in undue preference to persons and localities in Tennessee." So much was the Commission's finding of fact. Its conclusion of law was then stated, as a part of the same sentence, that the undue prejudice and undue preference so found to exist resulted "in unjust discrimination against interstate commerce."

See Exhibit "A," to Original Bill.

Appellees deny that the finding of the Commission, that the lower schedule of intrastate rates resulted in unjust discrimination against interstate commerce, was a finding of fact. It was only a conclusion of law, erroneously conceived because of the Commission's error in concluding that the prejudice to persons and localities in adjoining states and the preference to persons and localities in Tennessee with respect to governmental shipments constituted "undue" prejudice and preference made unlawful by the Interstate Commerce Act of Congress.

A comparison of the findings of the Interstate Commerce Commission with the written report, will show that the only finding of fact or conclusion of fact which the Interstate Commerce Commission intended to make, as a basis for its order, was a finding that the relation of published rates was such that persons or shippers in Tennessee were preferred and favored to the prejudice of persons and shippers in adjoining states.

The order of the Interstate Commerce Commission, based upon such finding, is void for two reasons.

First. Undue prejudice and preference between shippers can exist only by reason of the relation of rates legally fixed to which the carriers affected are required to adhere. The Interstate Commerce Commission is powerless to fix a legal rate for interstate shipments of stone and gravel shipped as the property of the federal or a state or municipal government. The power of the Interstate Commerce Commission is limited to the fixing of a *maximum* rate which the carriers may charge for such transportation in interstate commerce. Such a maximum rate, from which a carrier is at liberty to depart at will, by published tariff or by secret agreement, can form no basis or measure or standard for a finding of discrimination by comparison with other published rates.

Second. The prejudice to shippers and localities of states adjoining Tennessee and the preference to shippers in Tennessee when shown by the Commission to exist and resulting by reason of the lower level of intrastate rates on shipments of governmental property do not constitute undue preference and undue prejudice which are made unlawful by Congress; and therefore, no unlawful condition exists by reason of the relations of rates which the Interstate Commerce Commission is authorized to remove.

Both propositions result from the necessary and obvious construction of that part of Section 22 of the Interstate Commerce Act quoted in the opinion of the District Court, and from the application the Interstate Commerce Commission has given to the section in its Conference Rulings in force at the time of the making of the order involved herein and at the present time.

Conference Rulings adopted by the Interstate Commerce Commission and issued in bulletin form for the guidance of carriers in interstate commerce, are quoted in the original bill, in Section IV thereof. By these rulings the various interstate carriers were notified that Section 22 of the Interstate Commerce Act was construed by the Commission "to be special authority for carriers to depart from established tariff rates or fares; and for such transportation as

is provided for in said Section 22 it is not necessary for carriers to provide tariffs or observe tariff rates or fares and regulations except in the issuance, sale and use of mileage, excursion or commutation passenger tickets, and joint interchangeable mileage tickets."

Original Bill, Sec. IV.

(References to the printed record cannot be made herein for the reason that the record has not been printed at the date of the preparation of this brief, which is necessarily prepared in advance of the filing of the petition for supersedeas.)

In the report of the Interstate Commerce Commission in *United States* v. *Alabama & Vicksburg Railway Co., et al.*, 40 I. C. C., 405, the Commission held that it had authority to prescribe reasonable ratings for carload shipments of stamped envelopes and post cards shipped as the property of the United States, "although the carrier and the Government may agree upon some other rate." The Commission further said, however, that the effect of its action in fixing such a rate is only to fix the *maximum* rate which the carriers may *demand* from the Government.

United States v. *Ala. Vick. Ry. Co., et al.*, 40 I. C. C., 405.

The published tariffs of the interstate carriers showing rates for interstate shipments into Tennessee of municipal stone and gravel, published pursuant to the order *Ex Parte* 74, were only maximum rates which the carriers were allowed to charge for such transportation, and were not legal rates from which the carriers were not authorized or permitted to depart.

In the report of the Interstate Commerce Commission in the proceedings instituted by the carriers, pursuant to which the order involved herein was made, the Commission observed: "Respondents show that they follow the *general policy* of publishing in the regular manner such municipal rates as they maintain."

63 I. C. C. Rep., 172.

(Exhibit "A," to the Original Bill.)

The finding of the Interstate Commerce Commission of undue prejudice and undue preference was therefore based upon a comparison of intrastate rates with "the general policy," voluntarily pursued, by the carriers who were respondents to the proceeding before the Commission.

Such a comparison would not support a finding of preference and prejudice, even if only interstate rates were involved.

In *Louisville and Nashville Railroad Co.* v. *Maxwell*, 237 U. S., 94, the Supreme Court said:

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."
>
> 237 U. S., p. 97.

A legal rate which can constitute a measure of discrimination is a rate which has the certainty and to which the strict adherence is required, described in the foregoing quotation. It is the certainty with which interstate carriers are compelled to adhere to their published and duly filed rates, as indicated in the quotation from *Railroad* v. *Maxwell, supra*, which constitutes the basis of a finding of discrimination, and which was the foundation of the holding of this court in the noted Shreveport case (*Houston E. & W. T. Ry. Co., et al.* v. *United States*, 234 U. S., 342.) and other similar cases, that the Interstate Commerce Commission may order interstate carriers to make their intrastate rate structure conform to the level of their published and duly filed interstate rates, when it is shown that the two structures are related in the manner described in those cases. It is respectfully submitted that this court would

never have upheld the Interstate Commerce Commission in its order affecting intrastate rates in the Shreveport case, if the level of interstate rates to which the intrastate rate structure was made to conform had been one from which the interstate carriers were at liberty to lawfully depart by secret agreement with interstate shippers.

If the interstate rate which the carrier may *collect* is fixed according to the will and volition of the carrier, without the knowledge, approval or authority of any agency of the Federal Government, as in the case of the transportation of governmental property, it is a rate fixed by the carrier and not by the Federal Government, and an interstate rate so fixed cannot be the basis of an order of the Interstate Commerce Commission requiring an increase of the intrastate rate to the level of the interstate rate.

Minn. Rate cases, 230 U. S., 352, 417.

In making this contention appellees are not attacking or challenging the finding of the Interstate Commerce Commission that comparison of the intrastate rates in question as allowed by the Tennessee Commission with the published interstate rates on the same kind of shipments fixed pursuant to *Ex Parte* 74 shows a preference to shippers in Tennessee as against shippers in adjoining states; but the contention is that since the interstate carriers are not bound to adhere to the interstate rates published pursuant to Ex *Parte* 74 in transporting governmental property, the disparity in the *published* rates does not constitute or show a real discrimination or a real preference to Tennessee shippers as against shippers from adjoining states.

In the recent case of *Railroad Commission of Wisconsin et al.* v. *Chicago, Burlington & Quincy Railroad Company*, decided by this Court on February 27, 1922, and reported at page 237 of the Advance Opinions of Volume 66 of the Law Edition of the Supreme Court Reports, this Court concluded the opinion as follows:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount

power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."

R. R. Com. Wis. v. *C. B. & Q. R. R. Co.*, Decided Feb. 27, 1922.

The discrimination found to exist in the rates involved erein cannot be the "real discrimination" which this Court ferred to in the preceding quotation as the condition prece- nt to the exercise by the Interstate Commerce Commission control over intrastate rates.

Again the Supreme Court in *Illinois Central Railroad* . v. *Public Utilities Commission of Illinois, et al.*, 245 S., 493, 510, said:

"In construing the Federal statutes enacted under the power conferred by the Commerce Clause of the constitution, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of the State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. (Citing cases.) This being true of an Act of Congress, it is obvious that an order of subordinate agency, such as the Commission, should not be given precedence over a State Rate Statute otherwise valid, unless, and except, so far as, it conforms to a high standard of certainty."

Illinois Central R. R. v. *Pub. Utilities Com.*, 245 U. S., 493, 510.

Under the construction placed upon Section 22 of the erstate Commerce Act by the Interstate Commerce Com- sion, referred to hereinabove, carriers may depart at from published rates for the transportation interstate of ernmental property. A published rate, filed voluntarily by rrier, from which it may depart at will by secret agree- t, can form no basis for a finding of unjust discrimina- against interstate commerce, resulting from the rela-

tion of such published rate to intrastate rates, to remove which the Interstate Commerce Commission may exercise control over purely intrastate rates.

The power of the Interstate Commerce Commission over a rate structure is the same, or at least, closely akin to the jurisdiction of a court. Jurisdiction includes not only the power to make an order, but the power to enforce such order. If the order now under attack related alone to interstate rates and was made to remove a discrimination existing by reason of disparity in interstate rates, the Interstate Commerce Commission, by its Conference Rulings, concedes its inability to compel adherence by the carriers to its order fixing rates on governmental property. If such power does not exist with regard to an order fixing interstate rates, then certainly it could not exist with regard to a similar order affecting intrastate rates. The result is that the order of the Interstate Commerce Commission now under attack is one which the Interstate Commerce Commission is powerless to require the carriers to adhere to; yet, by reason of the paramount power of a federal agency over a similar state agency, the carriers may use the order of the Interstate Commerce Commission as authority to violate and flaunt the order of the State Commission. The holding of this Court hereinabove quoted from *Illinois Central Railroad* v. *Pubilc Utilities Commission of Illinois* refutes any contention that Congress intended to bestow such a power upon the Interstate Commerce Commission.

If Appellees are in error in their contention that the report of the Interstate Commerce Commission does not authorize or support a finding of the existence of prejudice to shippers in adjoining states and preference to shippers in Tennessee, and if Appellees are wrong in their contention that the finding of such preference and prejudice is shown to be baseless and unsupported on the face of the report, as above set out, then the Appellees assert, with confidence, that the effect of Section 22 of the Interstate Commerce Act, as construed by this Court, is to exclude such preference and prejudice from the unlawfulness defined by

Sections 2 and 3 of the Interstate Commerce Act, and to authorize such prejudice and preference as lawful.

Interstate Commerce Commission v. *B. & O. R. R.*, 145 U. S., 263.

In the case cited, the Court said:

"The unlawfulness defined by Sections 2 and 3 consists either in 'an unjust discrimination' or an 'undue or unreasonable preference or advantage,' and the object of Section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust."

I. C. C. v. *B. & O. R. R. Co.*, 145 U. S., 263.

It is stated in the brief filed herein for Appellants, the Railroads, that the holding of this Court in the case cited is *obiter dictum*; but Appellants do not suggest any other construction which can be given to the language of Section 22, affecting shipments of governmental property, without destroying it.

The prejudice and discrimination alleged to exist in the relation of the rates involved herein exist not by reason of rates put into effect by a single carrier, but they exist by reason of the relation of rates of a number of carriers. Unless Section 22 is to be construed as in the case of *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Company*, *supra*, one carrier may not transport the property of a governmental agency free or at reduced rates unless all other carriers serving the same territory grant a like privilege and concession to the same governmental agency and other governmental agencies similarly located.

If the prejudice and preference found by the Interstate Commerce Commission to exist in relation to the rates involved herein be not unlawful, there can be no question but that the Interstate Commerce Commission was without power to make the order here attacked.

Appellees insist respectfully, upon the foregoing, that the petitioners are not entitled to a *supersedeas* of the order of the District Court because it clearly appears from the record that on the final hearing said order will be affirmed.

II.

THE PETITIONERS ARE NOT ENTITLED TO ASK *FOR SUPERSEDEAS*

Effort has been made hereinabove to show that the order of the Interstate Commerce Commission involved herein was based *alone* upon a finding by the Interstate Commerce Commission that the existing relationship between intrastate rates and interstate rates preferred shippers in Tennessee to the prejudice of shippers in adjoining states.

The persons and localities injuriously affected were not complainants in the proceeding before the Interstate Commerce Commission in which the order was made. The Transportation Act of 1920, however, authorized carriers "concerned" to institute the proceeding before the Interstate Commerce Commission; the language of that Act apparently giving the carrier the right to institute such an investigation whether injuriously affected or not. This provision is contained in Paragraph 3 of Section 13 of the Interstate Commerce Act, as amended by the Transportation Act, 1920.

41 Statutes at Large, 484.

This statutory authority for a proceeding before the Interstate Commerce Commission at the complaint of carriers concerned, resulting in an order removing a discriminatory rate because injuriously affecting persons other than the carriers who instituted the proceeding, is wholly foreign to the principles of a court of equity, which confines its processes to the relief of complainants injuriously affected by the subject matter against which the process of the court is invoked.

The United States, the original defendant, placed by the statute primarily in control of the defense, and the Interstate Commerce Commission, which Commission made the order annulled by the District Court, have appealed, but are not seeking the supersedeas. They primarily must be considered as acting in this case for the benefit of the persons and localities in the states adjoining Tennessee against whom the Interstate Commerce Commission found prejudice in the rate structures involved.

From a statement made by the Interstate Commerce Commission in its written report that the Tennessee Commission, in authorizing an increase in the rates on stone and gravel for commercial purposes, "impliedly approved the general level *of those rates as increased,*" the carriers argue that the Interstate Commerce Commission found that the lower level of intrastate rates on municipal shipments of stone and gravel were unreasonable as providing inadequate compensation to the carriers performing the service of transportation. No such argument is justified by anything said by the Interstate Commerce Commission or by anything in the record. The Interstate Commerce Commission was not concerned with the reasonableness of the Tennessee rates as affected by the right of the carriers to have adequate compensation for the services performed by them in such transportation. Such questions were for the Tennessee Commission, and the Interstate Commerce Commission is concededly without jurisdiction to so control intrastate rates as to secure to the carriers reasonable compensation for their services in intrastate commerce. There is no finding therefore by the Interstate Commerce Commission that the higher level of intrastate rates on municipal stone and gravel is necessary to compensate the carriers for their services.

This is made clear by the holding of this Court in *American Express Co.* v. *Caldwell*, 244 U. S., 617, 624, as follows:

> "But the finding that discrimination exists and that interstate rates are reasonable does not necessarily imply a finding that the intrastate rates are unreasonable. Both rates may lie within the zone of reasonableness and yet involve unjust discrimination. *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, 145 U. S., 263, 277. Proceedings to remove unjust discrimination are aimed directly only at the relation of rates. If in such a proceeding an unreasonable rate is uncovered and that rate made reasonable, it is done as a means to the end of removing discrimination. The correction is an incident merely."
>
> *American Express Co.* v. *Caldwell*, 244 U. S., 617, 624.

There is nothing in the record to indicate that the Tennessee Commission declined to permit the railroads in Ten-

nessee to increase their intrastate rates on municipal shipments of stone and gravel for road-building purposes on the ground and theory that the governmental agencies were entitled to a preference. There is nothing to indicate that the Tennessee Commission's order was based upon any other consideration except a finding by that Commission that for such transportation the rate fixed was reasonable and adequate; and if, as petitioners contend, the Tennessee Commission had no power to require the carriers in Tennessee to carry governmental property "at reduced rates," then this Court should not presume that the Tennessee Commission acted unlawfully and based its order declining the increase on any such consideration.

Authority may be found in the reports of the Interstate Commerce Commission for a classification of carload shipments of stone for road-building purposes in the exercise of the rate-making power. In its report in *State of Maryland* v. *Pennsylvania Railroad Co., et al.*, 30 I. C. C., 22, 25, the Interstate Commerce Commission had under consideration proposed increased rates "for the transportation of interstate shipments of crushed stone for road-making purposes." In considering the reasonableness of the proposed rate on such commodity, the Interstate Commerce Commission exercised its common knowledge, without reference to any proof, by the following finding:

> "Road stone is a very low grade commodity; it loads generally about sixty thousand pounds to the car, requires only ordinary transportation equipment, and is free from claims for damage in transit."
> 30 I. C. C. Rep., 22, 25.

Volume of traffic may also be considered in determining an adequate and reasonable rate on a given commodity. Counsel for Appellants, the Railroads, refer to the colossal road-building program of the state and federal governments. It may fairly be inferred from the existence of such a program that the Tennessee Commission contemplated the movement of stone and gravel for road-building purposes in train loads, or in lots more than a single car load, all of which affects the expense of transportation.

In the case above cited the carrier of its own initiative had evidently made a difference in its proposed rates on crushed stone for road-making purposes and its rate on crushed stone for commercial purposes.

The Interstate Commerce Commission reports also contain another instance of the practice of making a different rate on stone for road-building purposes from the rates on stone for commercial purposes. In Louisiana Rates, 60 I. C. C., 428, the Commission stated that it was shown in argument that the Illinois Central Railroad, one of the appellant companies here, had filed with the Commission schedules of interstate rates for transportation of "municipal sand and gravel," for streets, etc., which were lower than interstate rates on commercial shipments of sand and gravel to and from the same point.

60 I. C. C., 378.

With these instances of the implied approval of the Interstate Commerce Commission of the practice of making a different rate for transportation of municipal stone and gravel for road purposes from the rate between the same points on commercial shipments of stone and gravel, it cannot be reasonably argued, without proof and without a finding of fact by the Commission, that the order of the Tennessee Commission was not based upon a substantial difference in the traffic affected, and a finding that the rate fixed by it was high enough to afford adequate compensation to the carrier affected for the services performed.

The situation then is that the Railroads are seeking by supersedeas to have restored a rate higher than the rate found to be adequate and compensatory by the only tribunal authorized to determine the question which has ever investigated the adequacy of such rates as affording sufficient compensation for the services performed; such effort being based upon the authority of an order of the Interstate Commerce Commission made for the benefit of persons and localities who are not before the Court except as they may be represented by the Government and by the Interstate Commerce Commission, and not made for the benefit of the petitioning railroads.

Appellees insist that the railroads petitioning for supersedeas have no standing in this Court, as a court of equity, in their appeal to the discretion of the Court.

In the petition filed in this Court for supersedeas the carriers state as the reason for their insistence that a supersedeas is necessary, that in the event the appeal should be successful, the carriers would be compelled to sue two shippers, the State and the Federal Government, for the difference between the rate authorized by the Tennessee Commission and the rate authorized by the Interstate Commerce Commission, which suits the carriers say would be difficult because of the sovereign capacities of the two shippers, and also they would be required to sue the various counties and municipalities of Tennessee, resulting in inconvenience to the carriers.

Appellees reply that if a supersedeas be granted, not merely inconvenience will result to them, and to the various counties and municipalities of Tennessee, but irreparable injury; in that during the road-building season, the summer and fall months of the present year, traffic in road-building material will be diverted entirely from intrastate commerce to interstate commerce, resulting in the permanent loss to Appellees, and to the United States Government, of the difference between the intrastate rates and the interstate rates, unless the carriers, of their own free will and volition, consent to exercise the authority vested in them by Section 22 of the Interstate Commerce Act and grant to Appellees reduced rates in the transportation of their road-building material.

Appellees respectfully insist that the petition for supersedeas should be denied.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney General of Tennessee.

WM. H. SWIGGART, JR.,
Assistant Attorney General of Tennessee.

WASHINGTON, D. C., May 29, 1922.

Office Supreme Court, U. S.
FILED
MAY 27 1922
WM. R. STANSBURY
CLERK

No. 988

Supreme Court of the United States

OCTOBER TERM, 1921.

The United States, the Interstate Commerce Commission, the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and The Nashville, Chattanooga and St. Louis Railway, *Appellants.*

versus NO. 988

The State of Tennessee, The Railroad and Public Utilities Commission of Tennessee, et. al., *Appellees.*

On Appeal from United States District Court
Middle District of Tennessee.

MOTION ON BEHALF OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE ILLINOIS CENTRAL RAILROAD COMPANY, AND THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY FOR WRIT OF SUPERSEDEAS.

JOHN BELL KEEBLE,
CHARLES N. BURCH,
FITZGERALD HALL,
Counsel for Appellant Carriers.

May, 1922.

AMBROSE PRINT. NASHVILLE

Supreme Court of the United States

OCTOBER TERM, 1921.

The United States, the Interstate Commerce Commission, the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and The Nashville, Chattanooga & St. Louis Railway.

Appellants,

versus *No. 988*

The State of Tennessee, The Railroad and Public Utilities Commission of Tenneseee, et al.

Appellees.

MOTION ON BEHALF OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, THE ILLINOIS CENTRAL RAILROAD COMPANY, AND THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY FOR WRIT OF SUPERSEDEAS.

To the Honorable The Supreme Court of the United States:

Come the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and The Nashville, Chattanooga & St. Louis Railway and move the court for the issuance of a writ of supersedeas to suspend (pending appeal to this court perfected May 20, 1922) the final decree of the United States Dis-

trict Court for the Nashville Division, Middle District of Tennessee, rendered on April 24, 1922, in this cause, entitled below "State of Tennessee vs. United States, et al. Said final decree of the District Court enjoined the enforcement of an order of the Interstate Commerce Commission and adjudged said order of the Interstate Commerce Commission to be void. Said order of the Interstate Commerce Commission directed an increase in certain intrastate rates. as shown below.*

Grounds of Motion.

Following Ex Parte 74 ("Increased Rates 1920, 58 I.C.C., 220") Tennessee carriers, after increasing interstate rates in accordance with the direction of the Interstate Commerce Commission in said proceeding, undertook to make similar increases in rates and charges for intrastate movements within the State of Tennessee. After hearing and some delay the Railroad and Public Utilities Commission of the State of Tennessee made an order, dated November 19, 1920, approving such increase, except on one commod-

*Application for supersedeas in this cause was duly presented to Mr. Justice Day at Chambers at his residence in Washington May 16, 1922, and after a consideration thereof he directed that such application be made to the Court on May 29, 1922, such application being made under section 210 of the Judicial Code.

ity not now involved and "*on carload shipments of stone and gravel moving intrastate between points in Tennessee when for use in building public highways and consigned to federal, state, county or municipal authorities or their bona fide agents. .... .*" (R., p. 17.)

The carriers thereupon applied to the Interstate Commerce Commission for relief from said order of the Tennessee Commission and on August 13, 1921 (63 I. C. C. 160), "In the Matter of Intrastate Rates and Charges in the State of Tennessee," No. 12132, the Interstate Commerce Commission found after full hearing that the rates and charges prescribed by the Tennessee Commission resulted in;

(a) Undue prejudice to persons and localities in states adjoining Tennessee;

(b) In undue preference to persons and localities in Tennessee;

(c) In unjust discrimination against interstate commerce.

(d) "We further find that the increases made by respondents in their interstate rates for the transportation of stone and gravel, in carloads, under our decision relating to the southern

group in Ex Parte 74, result in *reasonable charges for the interstate transportation* of those commodities between points in Tennessee and points in adjoining states. . . ." (63 I. C. C., p. 177) (R., p. 36.)*

(e) "We find that said undue prejudice, preference, and discrimination can and should be removed by *making increases in the intrastate rates for the transportation of stone and gravel,* in carloads, when for use in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, in force on the date of our decision in Ex Parte 74, *which shall correspond with the increases heretofore made and now in effect as aforesaid in the interstate rates* for the transportation of said commodities shipped in interstate commerce between points in Tennessee and points in adjoining states." 63 I. C., 177-8. (R., pp. 36-37.)

Thereupon, the State of Tennessee and the Railroad and Public Utilities Commission of Tennessee instituted this suit by filing a bill in the United States Dstrict Court, Nashville Division, Middle District of Tennessee, against the

*Record citations refer to original record.

United States for the purpose of having said order of the Interstate Commerce Commission declared to be unlawful and void and thereby re-establish said order of the Tennessee Commission dated November 19, 1920. (Exhibit A to original bill, R., pp. 14, 16.)

The Interstate Commerce Commission, the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company and The Nashville, Chattanooga & St. Louis Railway intervened. Hearing was had before three judges on motion to dismiss.

The predicate of the bill was that the power which the Interstate Commerce Commission has to maintain parity and equality between interstate and intrastate rates does not exist when the commodities transported are consigned to the federal or state governments and political sub-divisions thereof, and that Sections 2 and 3 of the Act to Regulate Commerce do not apply to transportation for those classes specified and designated in said Section 22; in other words, that *there exists a large volume of traffic subject to no laws, no rules, no regulations.*

Three judges considered the case, sustained the complainants' contention and granted an injunction, a final decree being entered.

The intervening carriers perfected an appeal to this honorable Court May 20, 1922. The United States and the Interstate Commerce Commission have perfected separate appeals. Said carriers therefore move the Court for a writ of supersedeas pending appeal, hearing and determination of this cause and express their willingness to enter into bond in any amount upon such conditions as to the Court may seem right and proper, said supersedeas being indispensable to protect the interests of said cariers for the following reasons:

Necessity for Supersedeas.

1. Should the carriers' appeal be prosecuted to effect without supersedeas, their only remedy would be (a) to sue the United States and the State of Tennessee, *two sovereign powers*, which have not consented to be sued in such a case, and (b) to sue the various counties and municipalities which could be done but would involve a *multiplicity of lawsuits*.

2. On the other hand, if the writ of supersedeas be granted as prayed, adverse parties will

be fully and completely protected by the supersedeas bond, and should the carriers not be successful on appeal, such adverse parties will have no difficulty in promptly recovering the full amount to which they and each of them may be entitled.

For these reasons and on this account, said carriers respectfully move for a writ of supersedeas in this case and respectfully request the Court, in the event the supersedeas be allowed, to designate the amount of the bond,* the conditions thereof and whether it will accept the United States Fidelity and Guaranty Company as surety on the bond.

Due notice has been given the adverse parties of the filing and presentation of this motion. Separate brief and argument on the merits of the cause have been duly filed and are respectfully presented with this motion.

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*As to the amount of bond see affidavit of H. F. Smith hereto attached, page 15 infra. The carriers make no question as to the amount. Appellees were unwilling to express their wishes as to the amount should supersedeas be granted.

THE LOUISVILLE & NASHVILLE RAILROAD, COMPANY,

By JOHN BELL KEEBLE,
Attorney.

THE ILLINOIS CENTRAL RAILROAD COMPANY,

By CHARLES N. BURCH,
Attorney.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,

By FITZGERALD HALL,
Attorney.

On behalf of the appellees, complainants below, I, the Assistant Attorney General of the State of Tennessee, acknowledge full and complete notice of the filing and presentation of this motion and receipt of a copy of the brief and argument accompanying same.

W. H. SWIGGART, Jr.,

Assistant Attorney General of the State of Tennessee and Counsel for Appellees.

SYNOPSIS OF BRIEF*

This is an application for a writ of supersedeas by interested carriers to suspend an order of the District Court enjoining an order of the Interstate Commerce Commission made after full hearing directing an increase in certain intrastate rates in Tennessee in order to maintain a proper relationship between interstate and intrastate rates and prevent the resulting discriminations against both persons, localities and interstate commerce, (R., 36-37); an exercise of power sustained by this Court in the recent Wisconsin and New York rate cases, 42 Supreme Court Reporter, 232, 239.

The Interstate Commerce Commission after hearing found *as a fact* from the evidence that the order of the Tennessee Commission resulted in undue prejudice to persons and localities in States adjoining Tennessee; in undue preference to persons and localities in Tennessee; and unjust discrimination against interstate commerce; and *directed a removal of this discrimination by increasing the intrastate rates.* Not only

*Separate brief on the merits has been filed.

is there material evidence to support its finding —and it is therefore not subject to challenge here *on the facts, Manufacturers Ry.* v. *United States*, 246 U. S., 457,—but it was unchallenged by complainants below, appellees here.

Appellees seek to find an exception to the rule so recently announced by this Court in the Wisconsin and New York cases, supra, claiming (a) that the Tennessee Commission has the power to compel carriers against their will to give preference to the Government, the State and the political subdivisions thereof, *regardless of the resulting discriminations and burdens*, and (b) that the Interstate Commerce Commission has no supervision of traffic moving to consignees designated in Section 22 of the Interstate Commerce Act and that said section so removes from the Act transportation to those enumerated therein as not to be subjected to its various provisions, particularly Sections 2 and 3 thereof.

The carriers' position on the application for a supersedeas is briefly as follows:

(1) The case being one of first impression and it being entirely possible to protect the adverse parties by the execution of a supersedeas

bond, this Court should exercise the discretion vested in it by Section 210 of the Judicial Code (U. S. Compiled Statutes, Section 999) by granting a supersedeas, because, should a supersedeas not be obtained and the carriers be successful, they will not be able to sue two interested parties, namely, the United States and the State of Tennessee, being sovereigns which have not consented to be sued; and because collection from the various counties and municipalities in the State would involve a multiplicity of lawsuits.

(2) The Tennessee Commission is a statutory body with no inherent power and is not vested with the right and power to compel carriers to give preferences to any persons, places or descriptions of traffic. *New River Lumber Co.* v. *Tennessee Ry.*, (Tenn.) 238 S. W., 867; *Gulf & Ship Island R. Co. v. R. R. Com.*, 94 Miss., 124, 49, So., 118. Under the Tennessee law, quoted in full in the brief filed with their motion for supersedeas, carriers have no express power to give preferences to the United States, the State of Tennessee, the counties and municipalities thereof. The Tennessee Commission having no power, express or implied, to force carriers against their will to give any preferences, the

order of the Tennessee Commission was *ultra vires* and void, so the appellees are in no position to challenge the validity of the order of the Interstate Commerce Commission.

(3) Section 22 of the Interstate Commerce Act is not subject to the construction contended for by appellees. Traffic moving thereunder is subject to the law, not entirely free from regulation. There is a limit to the preferences that may be given thereunder. *In fact, no preference can be given which results in a violation of other sections of this Act.* This court has many times held that Section 22 must be construed together with various other sections of the statute, and in *Pennsylvania Railroad* v. *Puritan Coal Co.*, 237 U. S., 121, 130, said that said section was to be construed "in connection with the statute as a whole," a conclusion inconsistent with the opinion of the District Court in the case at bar.

In conclusion, we have the following situation: The Interstate Commission has approved as reasonable certain rates for interstate commerce; the Tennessee Commission has approved as reasonable those *same rates* for all intrastate commerce save stone and gravel consigned to the

United States, the state, counties and municipalities for the limited purpose of building roads and for no other; the Interstate Commerce Commission conformably to Section 13 of the Interstate Commerce Act investigated the effect of said order of the Tennessee Commission and found that it imposed an undue burden on interstate commerce and an unjust discrimination against persons and localities in adjoining states —no question being made by appellees that the facts did not justify this conclusion of fact by the Commission—and ordered the carriers to increase their intrastate rates. *The District Court held that the Interstate Commission was without power to thus protect interstate commerce and shippers in interstate commerce against said order of the State Commission.*

The burden being upon those who challenge a decision of this Court or undertake to develop exceptions thereto, it would seem that no legitimate objection can be made to the granting of a supersedeas pending appeal, particularly where the two most interested parties are sovereign powers against which in the absence of supersedeas the carriers, if successful, could obtain no relief under existing laws.

It is respectfully submitted that sufficient ha
been shown to warrant this Honorable Court i
exercising its discretion in favor of granting th
supersedeas.

Respectfully submitted,

JOHN BELL KEEBLE,

CHARLES N. BURCH,

FITZGERALD HALL.

Attorneys for Appellant Carriers.

May, 1922.

STATE OF TENNESSEE,
COUNTY OF DAVIDSON.

I, H. F. Smith, being duly sworn, state as follows: I am the Vice President and Traffic Manager of The Nashville, Chattanooga & St. Louis Railway and am familiar with the proceedings in this cause, the effect upon the rates and the general amount and character of the traffic affected on the three railroads.

The difference in the rates ordered by the Interstate Commerce Commission and those ordered by the Tennessee Commission amounts generally on an average to about $12.00 per car. It is my judgment—and this of necessity is an estimate—that between the present date and January 1, 1923, not more than four thousand (4000) cars of stone and gravel will move in Tennessee over these three roads affected by the rates involved in this case so that in my judgment a bond of $50,000 would fully and amply protect all adverse interested parties.

H. F. SMITH.

Signed and sworn to before me this
25th day of May, 1922.

W. A. MILLER
Notary Public.

Office Supreme Court, U. S.
FILED
APR 9 1923
WM. R. STANSBURY
CLERK

No. 429.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

THE STATE OF TENNESSEE ET AL., APPELLEES.

MEMORANDUM REPLY BRIEF FOR INTERSTATE COMMERCE COMMISSION.

J. CARTER FORT,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

APRIL, 1923.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1923

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, appellants,
v.
THE STATE OF TENNESSEE ET AL., appellees.
No. 429.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

MEMORANDUM REPLY BRIEF FOR INTERSTATE COMMERCE COMMISSION.

It is asserted in appellees' brief that the findings of discrimination by the Interstate Commerce Commission were confined to findings that the lower intrastate rates resulted in undue preference to persons and localities within the State of Tennessee and undue prejudice to persons and localities outside of the State. This assertion is relied upon as support for much of the argument advanced. But it seems very plain that the Commission based its order not only upon findings of preference and prejudice in respect to certain persons and localities but also upon the finding that the lower level of rates within the State resulted in an "unjust discrimination against interstate * * * commerce" as that term is used in section 13 (4).

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The Commission expressly found that the failure of the carriers to increase their intrastate rates "for the transportation of stone and gravel when used for the construction of public highways and consigned to Federal, State, county, or municipal authorities" in amounts corresponding with increases which were made in the interstate rates on the same commodities, upon the authority of Ex parte 74,

> has resulted in the past and will result in the future in lower rates on those commodities than the corresponding interstate rates between points in Tennessee and points in adjoining States and in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining States; in undue preference to persons and localities in Tennessee; *and in unjust discrimination against interstate commerce.* (Italics ours.) (Record, pp. 38, 39.)

The Commission thus made an explicit finding of general discrimination against interstate commerce. Appellees attempt to explain away the force of this finding by saying,

> The additional words * * * "in unjust discrimination against interstate commerce" are restricted by the preceding reference to persons and localities and are not additional findings of fact. These words are merely descriptive of the effect of the unjust prejudice to persons and localities in interstate commerce in States adjoining Tennessee, as found by the Commission.

But the findings of the Commission are in the words of section 13 (4), and unless it can be said that the words "undue, unreasonable, and unjust discrimination against interstate or foreign commerce" as used in the statute are merely descriptive of the "undue or unreasonable advantage, preference, or prejudice as between persons and localities" referred to in the preceding language of the statute and add nothing to that language, it can not be said that these words in the Commission's findings add nothing to the preceding findings.

In *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, it was contended that the phrase "undue, unreasonable, or unjust discrimination against interstate or foreign commerce" was tautological and added nothing to the preceding language of the statute. The contention was rejected by the Court and conclusively answered in the following language:

> Counsel for appellants * * * are forced to the position that the words [undue, unreasonable, or unjust discrimination against interstate or foreign commerce] are tautological and a mere repetition of "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand," which precede them. In view of their apt application to the most important purpose of the legislation, we are not at liberty to take such a view. If "undue, unreasonable,

or unjust discrimination against interstate or foreign commerce" are tautological, why are they followed by the phrase "which is hereby forbidden and declared to be unlawful"? To accompany a meaningless phrase with words of such special emphasis would be unusual.

It is urged that in previous decisions, notably the *Minnesota Rate cases*, 230 U. S. 352, the *Shreveport case*, *supra*, and the *Illinois Central case*, *supra*, the expression "unjust discrimination against interstate commerce" was often used when, as the law then was, it could only mean discrimination as between persons and localities, and therefore that it is to be given the same limited meaning here. But here the general words are used after discrimination against persons and localities have been specifically mentioned. The natural inference is that even if they include what has gone before they mean something more. When we find that they aptly include a kind of discrimination against interstate commerce which the operation of the new act for the first time makes important and which would seriously obstruct its chief purpose, we can not ignore their necessary effect.

In addition to the language quoted above from the findings of the Commission, the report contains other language which shows unmistakably that the Commission intended to make a general finding of discrimination against interstate commerce as well as findings of prejudice and preference in respect to

localities and persons. For example, the Commission stated:

> From figures based on actual movements of stone and gravel during the year ended September 30, 1920, respondents estimate that the refusal of the Tennessee commission to permit the increases in rates on those commodities when used for road building is costing the Louisville & Nashville, the Nashville, Chattanooga & St. Louis, and the Southern Railways, in the aggregate, about $16,445 annually.
>
> The record conclusively shows that with few exceptions the proposed rates on stone and gravel would not exceed respondents' interstate rates on these commodities between points in Tennessee and points in adjacent States for similar distances. The latter rates are shown by numerous comparisons to be relatively just and reasonable. In authorizing an increase in the rates on stone and gravel for commercial purposes the Tennessee commission impliedly approved the general level of those rates as increased. The lower rates on municipal shipments unjustly discriminate against and unduly prejudice interstate commerce. (Record, p. 38.)

Referring to this expression by the Commission, pellees say, "this purports only to state an estimate the carrier. It is not the finding of the Interstate mmerce Commission. No reference to this esti-te is made 'in the Commission's findings.'" parently, appellees assume that the Commission st make formal findings of the primary or minor

facts upon which its conclusions are based. But this is not necessary except in cases where damages are awarded. *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 490. The Commission had before it evidence concerning the general discrimination against interstate commerce caused by the disparity between the interstate rates and intrastate rates, and the Commission considered such evidence.

Appellees base their case exclusively upon section 22, claiming that intrastate transportation for the State of Tennessee and other governmental authorities is exempted from the jurisdiction of the Interstate Commerce Commission by this section, the pertinent language of which is repeated here for convenience:

> That nothing in this act shall prevent the carriage, * * * of property free or at reduced rates for the United States, State, or municipal governments, * * *.

It will be observed that the exemption claimed is not specifically provided for by the language quoted. The purpose of the act to regulate commerce, prior to the amendments contained in the Transportation Act, 1920, was to prevent carriers from charging extortionate rates and from discriminating between shippers. In section 22 Congress simply made a distinction between transportation for the United States, State, and municipal governments on the one hand and transportation for private parties on the other, and rendered it possible for carriers to discriminate in their rates and charges between the two

classes of traffic. This was not inconsistent with the purpose of the law.

But the scope and purpose of the act to regulate commerce were greatly enlarged by the amendments. "The most important purpose" of the amendments was to maintain an adequate transportation system, and to that end it was provided that the Commission should fix rates which would yield to the carriers a fair return on the value of their properties. It was also provided as an integral and necessary part of the new scheme of regulation that unjust discrimination against interstate commerce should be unlawful. This was deemed necessary to make certain that intrastate commerce would contribute its fair share of the requisite revenue of the carriers.

The discrimination presented in this case is not discrimination between Government shipments and private shipments such as is contemplated by section 22, but discrimination between State and interstate commerce of identically the same character, and the result of such discrimination is that the State commerce involved does not carry its just part of the cost of maintaining the transportation system, contrary to the manifest purpose of Congress.

Furthermore, the discrimination is not the result of the exercise by the carriers of any privilege which they claim under section 22, but the result of action taken by the State of Tennessee. The evident purpose of section 13 (3) (4) was to prevent State authorities from burdening interstate commerce.

Section 22 does not confer upon the carriers the right to discriminate against interstate commerce and in favor of intrastate commerce of the same character, and certainly it does not confer upon the States power to compel such a discrimination.

The power of the Interstate Commerce Commission to prescribe rates applicable to the transportation of Government property is as great as its power to prescribe rates applicable to the transportation of private property, and the rates so prescribed are as binding in the one case as in the other until the carrier exercises such rights as it may have under section 22 which are discussed hereinabove.

Notwithstanding the right of carriers to discriminate between what may be called public traffic on the one hand and private traffic on the other, conferred by section 22, the Commission has never considered it necessary to provide for this distinction in its orders, and it is apparent that to do so would be a work of supererogation. The right of carriers to discriminate between public and private traffic results not from orders made by the Commission but from the law itself, and the Commission's orders will be interpreted by the court with that fact in mind.

The order of the Commission under consideration here does not require carriers to exact rates for the transportation of traffic for the State of Tennessee in intrastate commerce which are greater than the rates contemporaneously exacted by them for the transportation of like traffic in interstate commerce.

contrary, the order leaves the carriers entirely
reduce rates applicable to the former trans-
on if they make corresponding reductions in
es contemporaneously applied by them to the
rtation of like traffic in interstate commerce.

J. CARTER FORT,
For Interstate Commerce Commission.

FARRELL,
Of Counsel.
, 1923.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 429.

UNITED STATES OF AMERICA, *Appellant*, AND INTERSTATE COMMERCE COMMISSION, *Intervening Appellant*,

v.

THE STATE OF TENNESSEE, THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, COMPOSED OF B. A. ENLOE, CHAIRMAN, HARVEY H. HANNAH, AND JULIAN H. CAMPBELL, COMMISSIONERS, AND THE STATE OF TENNESSEE, ON RELATION OF THE RAILROAD AND PUBLIC UTILITIES COMMISSION OF TENNESSEE, *Appellees*.

APPEAL FROM THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

BRIEF FOR THE UNITED STATES.

STATEMENT.[1]

Under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219), appellants appealed from the

[1] This appeal was advanced for hearing with No. 396, *Nashville, Chattanooga & St. Louis Railway Co.* v. *State of Tennessee*. With the exception of the appeal papers, the transcripts of record in the two cases are identical. To avoid confusion resulting from duplication of printing, appellants have printed their appeal papers only. With the consent of all of the parties and with the permission of the Court all other references will be to the transcript in No. 396.

final decree (No. 396, Tr. 52) of the District Cou
(Circuit Judge Denison and District Judges Sanfo
and Ross, concurring), who, after a full opinion
the merits (No. 396, Tr. 47), permanently annull
and enjoined the order of the Interstate Commer
Commission (No. 396, Tr. 39).[2]

[2] This case being a proceeding instituted by the Commission up
petition filed, and having been duly heard and submitted by the parti
and full investigation of the matters and things involved having been h
and the Commission, on the date hereof, having made and filed a rep
containing its findings of fact and conclusions thereon, which said rep
is hereby referred to and made a part hereof:

It is ordered, That the common carriers by steam railroad parties to t
proceeding, namely, * * * according as they respectively participa
in the transportation, be, and they are hereby, notified and required
cease and desist from practicing the undue prejudice, undue preferen
and advantage, and unjust discrimination found in said report to exist
the relation of interstate rates for the transportation of stone and gravel,
carloads, when for use in the construction of public highways and consign
to Federal, State, county, or municipal authorities or their bona fide agen
and to establish, put in force, and maintain rates for the transportation
said commodities in intrastate commerce within the State of Tennes
which shall exceed the rates of said respondents for the transportation
said commodities in effect July 29, 1920, and applicable to such transp
tation, in amounts corresponding to the increases heretofore made by sa
respondents and now in effect under Ex Parte 74 referred to in said repo
in said respondents' rates for the transportation of said commodities
interstate commerce within the State of Tennessee and between points
the State of Tennessee and points in adjoining States: *Provided, howev*
That nothing in this order shall be construed as requiring or authorizing a
common carrier to establish, put in force, or maintain any rate for the tra
portation of property in intrastate commerce which is greater than its cor
sponding rate contemporaneously in effect and applicable to the transp
tation of property in interstate commerce from, to, or at the same points.

It is further ordered, That nothing in this order shall be construed as p
hibiting any carrier, party to this proceeding, from increasing any rate
the transportation of property in intrastate commerce, prescribed in th
order, provided such increased rate does not exceed its corresponding ra
contemporaneously in effect and applicable to the transportation of pro
erty in interstate commerce, and provided further that such increase
made pursuant to the laws of the State of Tennessee, and with the approv
of the authorities of said State.

THE FACTS.

In *Ex parte 74*, Increased Rates 1920, 58 I. C. C. 220, the Interstate Commerce Commission authorized general freight rate increases, Eastern Group 40%, Southern Group 25%, Western Group 35%, Mountain-Pacific Group 25%; all passenger fares, rates on excess baggage, and rates on milk and cream, 20%, and a surcharge of 50% on the charge for space in sleeping and parlor cars.

On November 19, 1920, Railroad and Public Utilities Commission of Tennessee, after hearing evidence and argument concerning the proposed advance in intrastate rates, entered its order authorizing the several railroads in Tennessee to increase certain of the intrastate rates in amounts proportionate to the increases in interstate rates authorized by the order in *Ex parte 74* (No. 396, Tr. 14).[3] This order of the Utilities Commission provided that the railroads make no advances in the rates on intrastate shipments of sewer pipe (earthen, clay, or concrete), carload, over and above the rates on those commodities as in effect immediately prior

[3] The Commission having on date hereof made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof,

It is ordered, That the carriers respondents herein be, and they are hereby, notified and required to cease and desist from and after date hereof, and thereafter to abstain from publishing, demanding, or collecting any higher rates for the transportation of intrastate freight between points in Tennessee than in the succeeding paragraphs hereof; and

It is further ordered, That the Southern Railway may charge for and collect on intrastate shipments of common brick, carload, minimum 10,000 brick, the mileage scale as hereinbefore set out, and that no change be made in the application of said mileage scale; other intrastate rates on common brick, carload, as published by respondent carriers and in effect immediately prior to this original suspension, may be advanced 25 per cent, provided that no

to the date of the original suspension; *nor on carload shipments on stone and gravel moving intrastate between points in Tennessee, when for use in building public highways and consigned to Federal, State, county, or municipal authorities, or their bona fide agents.*

On December 23, 1920, Nashville, Chattanooga & St. Louis Railway and other companies filed their petition before the Interstate Commerce Commission averring that the order of the Utilities Commission created an undue burden upon interstate commerce, by unduly and unjustly preferring shippers and localities in Tennessee against shippers and localities in other states (No. 396, Tr. 4).

After investigation and hearing the Interstate Commerce Commission found that the intrastate rates on common brick and sewer pipe, in carloads, between points in Tennessee, were not shown to cause any undue, unreasonable, or unjust discrimination against interstate or foreign commerce (No. 396, Tr. 38). The Commission also found the lower

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advanced rate shall exceed the mileage scale of the Southern Railway as hereinbefore set out. In assimilating the different rates and mileage scales an estimated weight of 5 pounds per brick shall be used; and

It is further ordered, That respondents hereto shall make no advances in their rates on intrastate shipments of sewer pipe (earthen, clay, or concrete), carload, over and above the rates on said commodities as in effect immediately prior to the date of this original suspension, and

It is further ordered, That on carload shipments of stone and gravel moving intrastate between points in Tennessee, when for use in building public highways and consigned to Federal, State, county or municipal authorities, or their bona fide agents, that carriers respondent hereto shall make no advance in the rates and charges over and above those in effect immediately prior to the effective date of the original suspension on these commodities, and

It is further ordered, That this order shall continue in effect for a period of not less than two years from date when it shall take effect, unless otherwise ordered by this Commission.

intrastate rates and charges for the transportation of stone and gravel when used in the construction of public highways and consigned to Federal, State, County, or Municipal authorities, or their bona fide agents, in force on the date of the decision in *Ex parte 74*, resulted in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining States, and in unjust discrimination against interstate commerce (No. 396, Tr. 38, 39).

The Interstate Commerce Commission ordered that the intrastate rates be increased to the level of the interstate rates in effect under *Ex parte 74* on stone and gravel, to the end that the undue prejudice, preference, and discrimination should be removed (No. 396, Tr. 39, 40; *ante*, note, p. 2).

The single question raised by the Government's motion to dismiss and its assignments of error is, Was the Interstate Commerce Commission without jurisdiction to enter the order because of the provisions in Section 22 of the Act to Regulate Commerce?

ARGUMENT.

I.

BY THE INTERSTATE COMMERCE ACTS SECTION 22 IS IN LEGAL EFFECT STAMPED ON THE FACE OF EVERY TARIFF AND EVERY ORDER OF THE INTERSTATE COMMERCE COMMISSION WHICH ARE SUBJECT THERETO AT ALL TIMES AND NO COURT BY INJUNCTION OR COMMISSION BY ORDER MAY ENFORCE ITS PERMISSIVE PROVISIONS AGAINST THE CARRIERS.

The State of Tennessee makes no allegation with respect to the reasonableness of the rates prescribed in *Ex parte 74*, or the validity of the order entered in

pursuance thereof. On the contrary, the State rests its whole case on *Ex parte 74* as a foundation. No allegation is made and no proposition is advanced that if the property belonged to shippers or consignees other than the State of Tennessee and its governmental subdivisions, or the Government of the United States, that the order of the Commission would be invalid.

The peculiar character of the owner is the sole basis on which the invalidity of the order is claimed.

Section 22 provides (25 Stat. 855, 862):

> *That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat,* or the free carriage of destitute and homeless persons transported by chartiable socities, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this act shall be construed to prevent railroads

> from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.

The italicized lines have stood unchanged since the first act of February 4, 1887, was passed (24 Stat. 379, 387),[4] except the words "apply to" in the first line of the act of 1887 were changed to "prevent" in the act of 1889.

Sec. 24. Ch. 10, Laws of Tenn., 1897, p. 122, does not permit transportation free or at reduced rates "for United States, State or municipal governments."

The petition alleges (No. 396, Tr. 10):

> Petitioners further aver that the order of the Interstate Commerce Commission under such circumstances and conditions, constitutes an unwarranted and unauthorized interference with the reserved powers of the State of Ten-

[4] SECTION 22. *That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat,* or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act (24 Stat. 379, 387).

nessee, acting through its Railroad and Public Utilities Commission, in the control of purely intrastate transportation by common carriers, since it prevents the said Railroad and Public Utilities Commission of Tennessee from making a rate for the transportation of governmental property in Tennessee which it finds to be a reasonable rate for such transportation, simply because the same carriers, and other carriers, have filed with the Interstate Commerce Commission a schedule or schedules of rates on interstate shipments of governmental property from adjoining States to points in Tennessee, which are proportionately higher than the intrastate rates found by the Tennessee Railroad and Public Utilities Commission to be reasonable, when the interstate carriers are not required by the Act of Congress, nor by the rulings of the Interstate Commerce Commission to adhere to or maintain the published schedules of rates, but are authorized both by the Act of Congress and by the rulings of the Interstate Commerce Commission to enter into secret and private agreements for the transportation of such property in interstate commerce without notice to the Interstate Commerce Commission or any other governmental agency.

Petitioners aver that the true and proper construction of Section 22 of the Interstate Commerce act is that preference and discrimination in the transportation of governmental property in interstate commerce is not unjust discrimination and not undue or unreasonable preference, and such discrimination and preference are therefore not unlawful.

On the Government's motion to dismiss, the learned District Court held (No. 396, Tr. 51):

> Of course this giving of a preference under Section 22 is wholly permissive; the section does not confer upon any municipality the right to demand a preference. Nevertheless, the existence of the power is of value to the municipalities. They thereby get the right to competition in rates among the carriers for this traffic.
>
> * * * * *
>
> The Interstate Commission's whole power to regulate interstate commerce is modified by the exception that it may not forbid discrimination in favor of a state. Its power to control intrastate commerce must be modified by the same exception.

The learned District Court thus held that the provisions of Section 22 are permissive only. That being so, it is clear that the United States, State, or Municipal governments may not sustain a complaint before the Interstate Commerce Commission, under the interstate-commerce laws, to compel carriers to carry, store, or handle property free or at reduced rates. If the Interstate Commerce Commission entered an order directing the carriers to carry free or at reduced rates the coal consumed by the United States Navy, or by the State of New York or the city of Chicago in the maintenance of their institutions, such an order would immediately be adjudged null and void by any court called on to interpret it. And that being so, *a fortiori*, how may the State of Tennessee, sustain such a complaint on intrastate

traffic before the Interstate Commerce Commission, either under the interstate-commerce laws or under the Tennessee railway acts,[5] which do not permit transportation free or at reduced rates "for United States, State or municipal governments" (*ante* 7).

Unless the carriers prefer voluntarily to act under Section 22, the State of Tennessee with its road building stands precisely as if Section 22 were not in the statute (*Railroad Commission of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *State of New*

[5] Baldwin's Cumulative Code, 1920, § 3059a–14. *To fix freight and passenger rates; other powers as to abuses, unjust discrimination, location of depots, etc.*—Authority is hereby vested in the railroad and public utilities commission of Tennessee, and it is hereby made its duty to supervise and fix the rates, charges, and regulations of railroad freight and passenger tariffs; to correct abuses and to prevent unjust discrimination and extortions in the rates for freight and passenger tariffs on the different railroads in this State, and to require the location of such depots and the establishment of such freight and passenger buildings as the conditions of the roads, safety of freight, and public comfort may require. (1897, ch. 10, sec. 8; 1907, ch. 390, sec. 2; 1919, ch. 49, sec. 1.)

§ 3059a–46. *Complaints, hearing of; rates or charges determined; may make orders that railroads, etc., shall cease from exacting rates, following rules, etc.*—Whenever, after full hearing upon complaint or investigation instituted by the commission of its own motion, authorized under sections 3059a–3059a–59, the railroad and public utilities commission of the State of Tennessee shall be of opinion that any rates, charges, rules, or regulations which are made the subject of complaint or investigation are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or result in extortion, or are otherwise in violation of any of the provisions of said acts, said commission is hereby required, authorized, and empowered to determine what will be just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as maximum, and what individual or joint classification, rule, regulation, or practice is just, fair, and reasonable to be thereafter followed, and to make an order that any railroad company or any other person, party, or corporation subject to its jurisdiction shall cease and desist from exacting the rates or charges, or following the rules, regulations, or practices condemned, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall not adopt the classification and shall conform to and observe the regulation, rule, or practice so prescribed. (1897, ch. 10, sec. 32a; 1919, ch. 49, sec. 1.)

York v. *United States*, 257 U. S. 591; *Lehigh Valley Railroad Co.* v. *Public Service Commission*, 272 Fed. Rep. 758, 767; *City of New York* v. *United States*, 272 Fed. Rep. 768) as there is no power to enforce it against the carriers.

The affected carriers are here insisting on the enforcement of the statute. Their position is in all respects the same as that of the carriers in the cases cited. Obviously, it never occurred to the representatives of the State of Wisconsin, or the State of New York, or the city of New York, that they were entitled to an injunction under Section 22; nor has it ever occurred to anyone, shipper or carrier, in those cases, that if any carrier volunteered to carry for the United States, State or Municipal governments any property free or at reduced rates under Section 22, that the order in *Ex parte 74* prevented it from doing so. The order in *Ex parte 74* not only does not override the statute but it is subject thereto as if Section 22 was written across the face thereof.

The Interstate Commerce Commission has always so interpreted Section 22 (Conference Rulings, Bulletin No. 7, November 1, 1917; No. 396, Tr. 8).

In *Metropolitan Paving Brick Co.* v. *Ann Arbor Railroad*, 17 I. C. C. 197, 204, the Commission said:

> The paving-block interests insist that their product should be placed in a class by itself. It is asserted that shipments to eastern points are required to meet competition with asphalt, cedar block, bitulithic, and other paving material, and that except on the very lowest rate

the traffic will not move in good volume. It is further argued that the paving block used for paving streets, alleys, and roads is non-competitive with the other grades. As has been stated, there is a large use, which is on the increase, of paving block for building purposes. To meet this condition the paving interests suggest a classification limited to paving brick and block for the immediate use of the United States, state or municipal governments. So far as the use of paving blocks or brick for the use of the United States, state, or municipal governments is concerned, reference is made to section 22 of the act to regulate commerce which gives the carriers the right to transport traffic for the above-named authorities at reduced rates if they see fit to do so. This can be done notwithstanding the conclusion reached in this case. *What carriers may do is one thing and what they ought to be required to do is quite another thing. Certainly the Commission has no power under the law to order carriers to transport traffic for the United States, state, or municipal governments at reduced rates.* Furthermore, it is a matter of common knowledge that the United States, state, and municipal authorities rarely lay pavements themselves. Work of this kind is usually let by contract. We know of no reason why lower rates should be made for contractors of brick paving than should be made in favor of any other party who may have contracts for other work for public authorities. (Italics ours.)

In *Eschner* v. *Pennsylvania Railroad*, 18 I. C. C. 60, 63, the Commission, referring to that part of Section 22 which provides "that nothing in this act shall prevent * * * the issuance of mileage, excursion, or commutation passenger tickets," said:

> This language, as will be observed, is altogether permissive and has never been understood as giving the Commission authority to require interstate carriers to sell interstate transportation in that form. In *Field* v. *Southern Ry. Co.*, 13 I. C. C. Rep. 298, when that clause was under consideration, we said: "The Commission has no affirmative power to require carriers to establish special fares, based upon less than the normal passenger-mile revenue, for the use of passengers on particular occasions or for special purposes. This was so held in *Cator* v. *So. Pac. Co.*, 6 I. C. C. Rep. 113, and in *Sprigg* v. *B. & O. R. R. Co.*, 8 I. C. C. Rep. 443, and the question is not to be regarded therefore as open to further discussion."

In *United States* v. *Union Pacific*, 28 I. C. C. 518, 524, the Commission said:

> In so far as the laws administered by this Commission are concerned, the right of carriers to transport government property free or at reduced rates is elective and not mandatory. The carriers may, and frequently do, avail of this right and without tariff authorization, but this Commission is not empowered to require carriers to grant to the United States free transportation or other rates or concessions than those afforded the

general public. No duties are delegated to us under, and we can not assume to interpret or determine the purpose or scope of, the so-called public highways act or of statutes under which rights and privileges may be reserved to the United States in return for subsidies in lands or bonds or loan of credit. If the denial of the through routes and joint rates here sought tends to deprive the government of the full benefit of land-grant deductions reserved to it by statute, remedy must be sought at other hands than ours.

II.

THE UNITED STATES HAS FREQUENTLY INVOKED THE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION AND ITS POWER AND AUTHORITY TO REVISE THE RATES, FARES, AND CHARGES WHICH THE GOVERNMENT WAS FORCED TO PAY FOR THE CARRIAGE OF PERSONS AND PROPERTY.

In numerous instances the Government has invoked the jurisdiction of the Commission to attack rates, fares, and charges for the carriage of persons and property by filing complaints to the end that it, like any other shipper, might secure the benefits inuring from the provisions of the statute.

United States v. *N. Y., P. & N. R. R. Co.*, 15 I. C. C. 233, unreasonable rates on cartridges and powder, Norfolk to Annapolis, condemned and reparation awarded.

United States v. *B. & O. R. R. Co.*, 15 I. C. C. 470, fares for naval recruits from Pittsburgh to Newport, R. I., condemned as unreasonable and reparation awarded.

United States v. *Adams Express Co.*, 16 I. C. C. 394, unreasonable rates on merchandise, Washington, D. C., to Bremerton, Washington, condemned and reparation awarded.

United States v. *Denver & Rio Grande*, 18 I. C. C. 7, demurrage charges on certain carloads of cement detained at Thistle Junction, Utah, disallowed (subsequently reversed).

United States v. *Alabama & Vicksburg Railway*, 40 I. C. C. 405, rates established for the transportation of stamped envelopes and stamped newspaper wrappers in carloads from Dayton, Ohio, and of stamped postal cards in carloads from Washington, D. C., to various distribution points throughout the United States. The Commission said:

> Section 22 of the act to regulate commerce provides "That nothing in this act shall prevent the carriage * * * of property free or at reduced rates for the United States * * *." No rates are published on the articles involved by any of the defendants, and only the southern classification provides a rating for them.
>
> Defendants challenge our power to require the establishment of ratings, on the ground that they are not "common carriers" of government stamped articles, but are essentially private carriers under special contracts. They have been and are, however, ready and willing to transport these articles for the government at rates satisfactory to them, and we are not asked to prescribe ratings for the benefit of the general public. Under the circumstances

we think we have authority to prescribe re
sonable ratings for the traffic in questio
although, under section 22 of the act, the ca
rier and the government may agree upon so
other rate. Conference Ruling 36. The tar
rate or classification rating is the maximu
which the carriers may demand from the go
ernment. Conference Ruling 218.

United States v. *Union Pacific Railroad Co.*,
I. C. C. 518, 520, *supra*. Complaint seeking throu
routes and joint rates from Chicago *via* certa
points in the northwest for transportation of proper
of complainant. Hearing on the merits and rel
denied. The Commission said:

The fact that this proceeding was institut
by the auditor for the Interior Departme
and that it does not appear that any executi
or superior officer or lawfully empowered d
partment of the government authorized su
action to be taken in the name of the Unit
States presents in the view of defendan
reason for dismissal. Counsel for petition
states, however, that while the officer signi
the petition could not institute a suit in
United States court without authority fro
the Department of Justice, such authority
not a prerequisite in proceedings before th
Commission. The provisions of the act wi
respect to those who may apply to the Co
mission concerning things done or omitted
be done by common carriers subject there
are broad. Primarily our authority is ov
the subject matter of a complaint and th
parties complained of. In this instance th

> proper parties defendant are before us, full hearing has been had, and the material facts have been presented, and we are not deprived of jurisdiction to consider the merits of the controversy merely because delegation to the officers presenting the complaint of the right to do so in the name of the United States is not affirmatively shown.

Boise Lumber Co. v. *Pacific & Idaho Northern*, 33 I. C. C. 109, United States, intervenor, unreasonable rates on logs condemned, reasonable rates prescribed, and reparation awarded.

United States v. *Sumpter Valley Railway Co.*, 53 I. C. C. 607, complaint to establish through routes and reasonable joint rates on Government timber. Hearing on the merits and relief denied.

If the cases cited mean anything, it is that Section 22 may be made applicable only by the voluntary action of the carriers, and that such action may be exercised independently of any action by the Commission. On the other hand, if the carriers refuse voluntarily to act, and invoke the other provisions of the statute, Section 22 is inapplicable and all the provisions apply as well to property of the Government as to that of any other shipper.

The principal cases cited, in the opinion of the learned District Court, are readily distinguishable and neither controlling nor applicable.

In *Pennsylvania Railroad* v. *Towers*, 245 U. S. 6, 10, this Court, speaking through Mr. Justice Day, said:

> The *Lake Shore Case* did not involve, as does the present one, the power of a State commission to fix intrastate rates for commutation

> tickets where such rates had already been put in force by the railroad company of its own volition, and we confine ourselves to the precise question presented in this case, which involves the supervision of commutation rates when rates of that character have been voluntarily established by the carrier. The rates here involved are wholly intrastate. The power of the States to fix reasonable intrastate rates is too well settled at this time to need further discussion or a citation of authority to support it.

In *Lake Shore & Michigan Southern* v. *Smith*, 173 U. S. 684, 691, this Court held that the act of the legislature of Michigan providing that one thousand-mile nontransferable tickets shall be kept for sale at reduced rates at the principal ticket offices of all railroad companies was a taking of the companies' property without due process of law. Mr. Justice Peckham said:

> And it (the act) assumes to regulate the time in which the tickets purchased shall be valid and to lengthen it to double the period the railroad company has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law.

In *Interstate Commerce Commission* v. *Baltimore & Ohio*, 145 U. S. 263, 279, this Court, speaking through

Mr. Justice Brown, sustained the right of the carrier to issue a "party-rate ticket" for the interstate transportation of ten or more persons in interstate commerce at a lower rate than that charged to a single individual for a like transportation on the same trip, and held that the higher rate was not "an unjust and unreasonable charge" under Section 1, nor an "unjust discrimination" under Section 2, nor an "undue or unreasonable preference or advantage" within the meaning of Section 3. While reference is made to Section 22, it does not appear that the opinion was rested on that section, of which the court said (p. 278), "this section is rather illustrative than exclusive." The opinion appears to have been based on other sections of the act as indicated by the further language of the court (p. 279):

> In view of the fact, however, that every railway company issues such tickets; that there is no reported case, State or Federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public, it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons traveling upon them.

Section 22 has a distinct place in that it may be availed of by the carriers in times of disasters and calamities. All remember the Galveston cyclone, the San Francisco fire, and the Dayton flood. The World's Columbian Exposition at Chicago and the Panama-Pacific Exposition at San Francisco and

the construction and dismantling of the buildings thereof are likewise well within the recollection of all. Acts of the carriers in carrying food, clothing, shelter, construction materials and supplies, free or at reduced rates under Section 22 by reason of such circumstances, do not necessarily subject the carriers to the legal obligation to carry stone and gravel at reduced and discriminatory rates for road building in Tennessee.

The United States is one of the largest of all shippers. To affirm the judgment and sustain the position of appellees would be to take the Government traffic for which it now pays regular rates from under the protection of the interstate commerce laws and make it the subject of special rates and special considerations such as the State Commissions may see fit to impose. The consequent risks and disadvantages will far more than counterbalance the slight benefits which now accrue to the Government from the few concessions which the carriers may voluntarily grant under Section 22. The reversal of the judgment will give the Government the benefit of both regular rates under the interstate commerce laws and such special concessions as it may secure under Section 22, and no harm will come to anyone. This was clearly the Congressional intent and it ought to prevail.

The judgment should be reversed, the injunction dissolved, and the petition dismissed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

○

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No. 429.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

UNITED STATES, AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

v.

THE STATE OF TENNESSEE, ET AL., APPELLEES.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

J. CARTER FORT,
For Interstate Commerce Commission.

P. J. FARRELL,
Of Counsel.

MARCH, 1923.

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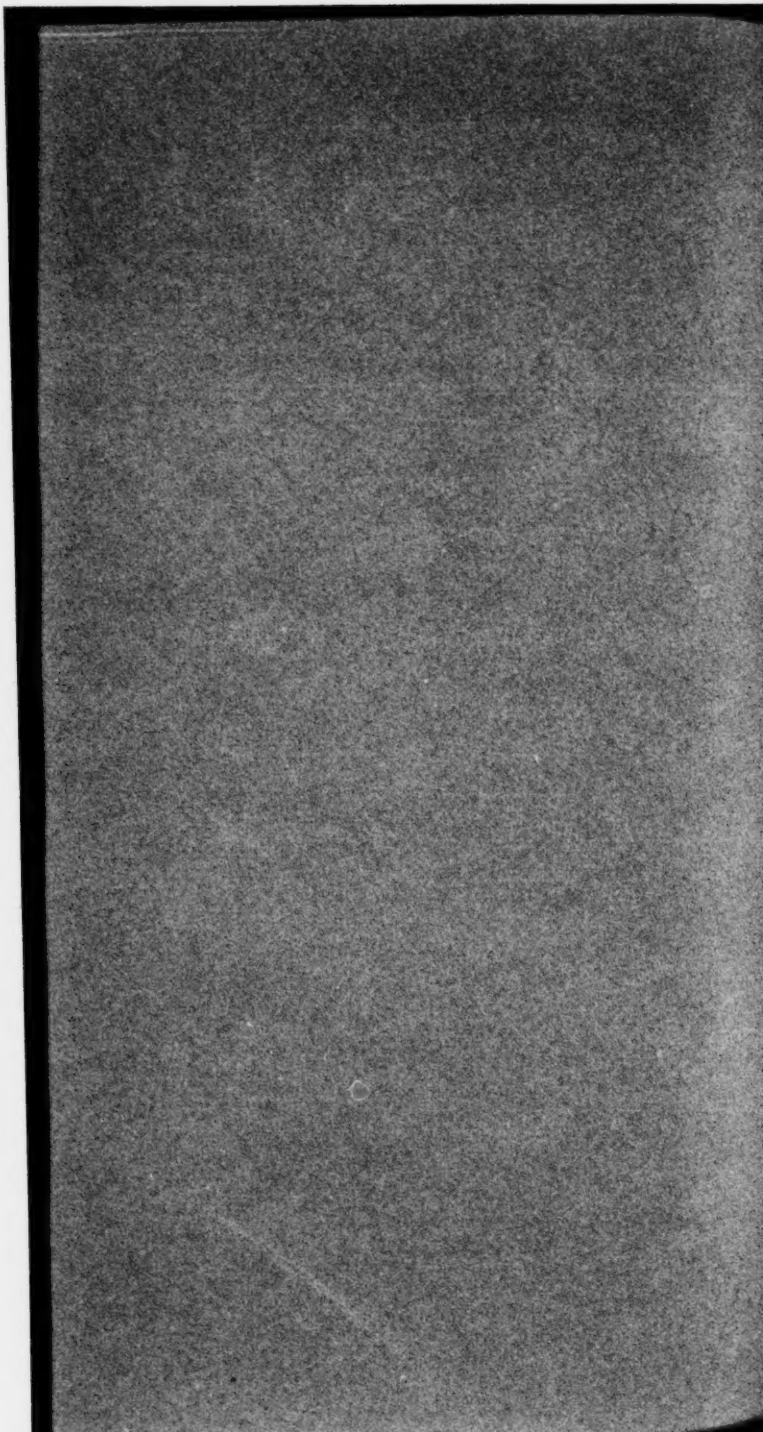

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In the Supreme Court of the United States

OCTOBER TERM, 1922.

UNITED STATES, AND INTERSTATE COMMERCE COMMISSION, appellants,
v.
THE STATE OF TENNESSEE, ET AL., APPELLEES. } No. 429.[1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

BRIEF FOR INTERSTATE COMMERCE COMMISSION.

STATEMENT OF THE CASE.

PRELIMINARY.

This is an appeal by the United States and the Interstate Commerce Commission[1] from a final decree of the United States District Court for the Middle District of Tennessee (Denison, Circuit Judge,

[1] A separate appeal, No. 396, was perfected by the Nashville, Chattanooga & St. Louis Railway and certain other railroad companies which intervened below. The two appeals raise the same questions and will be argued together. The transcript of record in No. 396 has been printed and by agreement of the parties is to be taken also as the record in this case, No. 429, with the exception of the appeal papers. The appeal papers in No. 429 are separately printed. Record references herein refer to the printed transcript of record in *Nashville, Chattanooga & St. Louis Ry.* v. *State of Tennessee et al.*, No. 396.

and Sanford and Ross, District Judges) setting aside, in part, the order of the Commission in *Tennessee Rates and Charges*, 63 I. C. C. 160.

The order of the Interstate Commerce Commission, in so far as it was set aside by the district court, required certain railroad companies operating in the State of Tennessee to discontinue a discrimination against interstate commerce which the Commission found to exist as the result of intrastate rates, within the State of Tennessee, applicable to the transportation of stone and gravel for the United States, State, County, or Municipal governments, hereafter called municipal rates, which were lower by 25 per cent than corresponding interstate rates applied to the transportation of the commodities between points in Tennessee and points in other states.

The lower intrastate rates had been established as the result of an order of the Railroad and Public Utilities Commission of the State of Tennessee, hereafter called the Tennessee Commission.

PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

In *Increased Rates, 1920*, 58 I. C. C., 220, Ex Parte 74, the Interstate Commerce Commission authorized an increase of 25 per cent in freight rates on interstate commerce in the so-called southern group, which includes Tennessee. Shortly afterward, the railroad companies operating in Tennessee applied to the Tennessee Commission for authority to increase intrastate rates 25 per cent and thus raise

them to the level of the increased interstate rates. The Tennessee Commission permitted such an increase in intrastate rates generally, but refused to permit any increases in the rates on stone and gravel when for use in the construction of public highways and consigned to Federal, State, County, or Municipal authorities, or their bona fide agents; or in the rates on one or two other commodities which are not involved in this case. The Tennessee Commission did, however, permit increases in intrastate rates on commercial stone and gravel; that is, stone and gravel transported for others than the Federal, State, County, or Municipal governments.

Upon petition of the interested railroad companies, the Interstate Commerce Commission, pursuant to section 13(3) of the Interstate Commerce Act, instituted an investigation to determine whether the State rates, which the Tennessee Commission had refused to permit to be increased, were unlawful in their relation to interstate rates on the same commodities in that they caused or would cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in intrastate commerce on the one hand and interstate commerce on the other hand, in violation of sections 2 and 3 of the Interstate Commerce Act, or any undue, unreasonable, or unjust discrimination against interstate commerce in violation of section 13.

The Interstate Commerce Commission held hearings, at which the Tennessee Commission was repre-

sented, and on August 3, 1921, issued its report in which it found:

> * * * that the increases made by respondents in their interstate rates for the transportation of stone and gravel, in carloads, under our decision relating to the southern group in Ex Parte 74, results in reasonable charges for the interstate transportation of those commodities between points in Tennessee and points in adjoining states and that the failure of said respondents within the state of Tennessee correspondingly to increase their intrastate rates and charges for the transportation of stone and gravel when used in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, in force on the date of our decision in Ex Parte 74, has resulted in the past and will result in the future in lower rates on those commodities than the corresponding interstate rates between points in Tennessee and points in adjoining states and in undue prejudice to persons and localities in interstate commerce between points in Tennessee and points in adjoining states; in undue preference to persons and localities in Tennessee; and in unjust discrimination against interstate commerce. (Record, p. 38.)

The rate situation resulting from the Tennessee Commission's order, with its obvious discrimination against interstate commerce and against "persons and localities in interstate commerce" and in favor of persons and localities in intrastate commerce, upon which the Commission's finding was based, is

illustrated by the following example selected from many described in the report:

> Crushed or broken stone, used in the construction of roads, is produced at a number of points in Tennessee, principally at Mimms, Newsom, Franklin, Carter's Creek, and Whitehead, in the vicinity of Nashville, and at Chattanooga, Chickamauga, Strawberry Plains, Mascot, and Knoxville, in eastern Tennessee. Producers at these points are in competition with quarrymen in adjoining states, who are shown to have been prejudiced by the action of the Tennessee commission. From Hopkinsville, Ky., a stone-producing point, to Sadlers, Adams, Cedar Hill, Kinney, and Springfield, Tenn., from 28 to 43 miles distant, the rate prior to Ex Parte 74 was 80 cents, or 10 cents lower than the intrastate rate from Franklin to the same stations for distances ranging between 48 and 63 miles. The rate from Hopkinsville has been increased to $1, reversing the former relationship, which properly reflected the differences in distance. There is also a 90-cent rate from Franklin to Gallatin, South Tunnell, Fountain Head, Portland, and Mitchellville, Tenn., for distances from 46 to 64 miles, which prior to August 26, 1920, was 10 cents higher than the rate from Bowling Green, Ky., a competing point, to the same destinations for distances between 27 and 45 miles. The Bowling Green rate is now 10 cents higher. (Record, p. 33.)

The following is also taken from the report:

> From figures based on actual movements of stone and gravel during the year ended

> September 30, 1920, respondents estimate that the refusal of the Tennessee Commission to permit the increases in rates on those commodities when used for road building is costing the Louisville & Nashville, the Nashville, Chattanooga & St. Louis, and the Southern railways, in the aggregate, about $16,445 annually. (Record, p. 38.)

The Commission entered an order requiring the railroad companies to remove the discrimination by increasing the intrastate rates in amounts corresponding to the increases which the railroad companies had made under the authority of Ex Parte 74 in their interstate rates between points within the State of Tennessee and points in other states.

The order reads, in part, as follows:

> It is ordered, That the common carriers by steam railroad parties to this proceeding, namely, * * * , according as they respectively participate in the transportation, be, and they are hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said report to exist in the relation of interstate rates for the transportation of stone and gravel, in carloads, when for use in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, and to establish, put in force, and maintain rates for the transportation of said commodities in intrastate commerce within the state of Tennessee which shall exceed the rates of said respondents for the

transportation of said commodities in effect July 29, 1920, and applicable to such transportation, in amounts corresponding to the increases heretofore made by said respondents and now in effect under Ex Parte 74 referred to in said report, in said respondents' rates for the transportation of said commodities in interstate commerce within the state of Tennessee and between points in the state of Tennessee and points in adjoining states; provided, however, that nothing in this order shall be construed as requiring or authorizing any common carrier to establish, put in force, or maintain any rate for the transportation of property in intrastate commerce which is greater than its corresponding rate contemporaneously in effect and applicable to the transportation of property in interstate commerce from, to, or at the same points. (Record, p. 39.)

PROCEEDINGS IN THE DISTRICT COURT.

On October 21, 1921, the State of Tennessee, the Railroad and Public Utilities Commission of Tennessee, and the State of Tennessee on Relation of the Railroad and Public Utilities Commission of Tennessee, filed a bill in the court below against the United States seeking to set aside the order of the Interstate Commerce Commission.

The bill alleges that the general authority of the Interstate Commerce Commission to remove discrimination against interstate commerce caused by intrastate rates does not include authority to remove such

discrimination when it results from lower intrastate municipal rates.

The following language of section 22 is relied upon by appellees:

> That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments. * * *.

The United States moved to dismiss the bill. The Illinois Central Railroad Company, the Louisville & Nashville Railroad Company, and the Nashville, Chattanooga & St. Louis Railway intervened and adopted the motion to dismiss filed by the United States. The Interstate Commerce Commission intervened and filed an answer denying that it had exceeded its authority, denying that the order injuriously affected the petitioners, and praying that the bill be dismissed. The answer raised no issues of fact.

After hearing on the motion to dismiss and on the bill and answer, the court entered a final decree on April 4, 1922, overruling the motion to dismiss and perpetually enjoining the enforcement of the order of the Interstate Commerce Commission in so far as it applied to municipal rates. The following is quoted from the decree:

> 2. That the order of the Interstate Commerce Commission in the matter of intrastate rates and charges in the State of Tennessee, entered August 3, 1921, and identified on the

> docket of said Commission as No. 12,132, directing Steam Railroad Companies to establish, put in force, and maintain rates for the transportation within the State of Tennessee of stone and gravel, in carloads, when for use in the construction of public highways and consigned to federal, state, county, or municipal authorities or their bona fide agents, in excess of rates charged by said companies on such transportation at and prior to the time of the entry of said order, is adjudged to be void to the extent that the rates therein ordered to be established, put in force, and maintained, affect or apply to such transportation, for the United States, State or Municipal governments, of stone and gravel, the title to which has passed to the government or is vested in it at the point of the origin of its transportation; and that to the extent that said order of the Interstate Commerce Commission is herein above adjudged to be void, and to that extent only, it be and hereby is annulled and set aside, and that the enforcement thereof be and hereby is perpetually enjoined. (Record, p. 52.)

A memorandum opinion was filed in which the court stated, among other things:

> * * * it [section 22] excludes this particular traffic [for the United States, State, or municipal governments] from the rate structure which the Commission is authorized to erect and control; in still other words, there is freedom in discrimination. (Record, p. 51).

ASSIGNMENTS OF ERROR.

There were twelve assignments of error which it is unnecessary to set out at length. This question is presented: Is the Interstate Commerce Commission without power, as the result of the provision of section 22 relative to reduced government rates, to protect interstate commerce from a discrimination growing out of intrastate rates on government shipments imposed by the authority of the State of Tennessee against the will of the carriers?

ARGUMENT.

APPELLEES' CONSTRUCTION OF SECTION 22 IS REPUGNANT TO THE SCHEME AND PURPOSE OF THE INTERSTATE COMMERCE ACT.

Appellees do not deny that the preferential municipal rates within the State of Tennessee are discriminatory against interstate commerce. They do not deny that the intrastate municipal rates, fixed by the order of the Interstate Commerce Commission to remove the discrimination against interstate commerce, are reasonable rates. In fact, the Tennessee Commission approved these rates for commercial shipments of stone and gravel within the state. Appellees merely claim that it is beyond the power of the Interstate Commerce Commission to remove this discrimination and, in support of their position, rely solely upon the provision of section 22, which they contend removes municipal rates, both state and interstate, from the control of the Interstate Commerce Commission, except

in so far as that control may be exercised to fix maximum municipal rates.

The provision in section 22 relative to reduced rates for the United States, State, or municipal governments appeared in the original act to regulate commerce approved February 4, 1887 (24 Stat. L. 379), in the following form:

> SEC. 22. That nothing in this Act *shall apply to* the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, * * *. [Italics ours.]

An act approved March 2, 1889 (25 Stat. L. 825), amended the provision so as to read:

> SEC. 22. That nothing in this Act *shall prevent* the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, * * *. [Italics ours.]

It seems manifest from the amendment that Congress did not intend that government rates should be withdrawn from the application of the statute.

The purpose of the provision was merely to declare that a railroad would not be guilty of granting a discrimination if it should give more favorable rates to shipments for the government than to shipments for "an ordinary person." *Interstate Com. Commiss.* v. *B. & O. Railroad*, 145 U. S. 263, where it was said at page 278:

> Indeed many if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily

> be held the subjects of unjust discrimination if more favorable terms are extended to them than to *ordinary passengers*. Such, for instance, are property of the United States, State, or municipal governments. * * *. [Italics ours.]

The provision is permissive only; it does not give the Interstate Commerce Commission power to require that reduced rates be granted to the state and it does not give the state a right to demand such rates.

In *Dairymen's Supply Co.* v. *P. R. R. Co.*, 28 I. C. C. 406, it was said:

> But, while the act authorizes the free transportation of property for the purposes named, it does not require the carriers to grant such transportation. It follows that the carriers may grant such transportation or deny it, as they deem best, * * * .

In *Metropolitan Paving Brick Co.* v. *Ann Arbor R. R. Co.*, 17 I. C. C., 198, it was said:

> What carriers may do is one thing and what they ought to be required to do is quite another thing. Certainly the Commission has no power under the law to order carriers to transport traffic for the United States, state, or municipal governments at reduced rates.

The fact that section 22 does not confer a right upon the state to demand a preferential rate was recognized by the district court in this case. We quote from its opinion:

> Of course this giving of a preference under section 22 is wholly permissive; the section

> does not confer upon any municipality the right to demand a preference. (Record, p. 51.)

Section 22 gives the carrier the right to carry for the state at reduced rates, but the only right which it gives to the state is the right to accept such rates if the carriers see fit to give them.

There is no allegation in the bill that the carriers are willing to apply reduced municipal rates within the State of Tennessee. On the contrary, it clearly appears that they are not willing to do so. The State of Tennessee can not be heard to complain that the Commission's order invades the rights of the railroad companies by denying them a right to grant a discrimination which they do not wish to grant. In *Interstate Comm. Com.* v. *Chi., R. I. & Pac. Ry.*, 218 U. S., 88, 109, this court stated:

> * * * That the companies may complain of the reduction made by the Commission so far as it affects their revenues is one thing. To complain of it as it may affect shippers or trade centers is another. We have said several times that we will not listen to a party who complains of a grievance which is not his. * * *.

The district court in this case, after saying that section 22 did not confer upon the state the right to demand preferential rates, said:

> Nevertheless, the existence of the power is of value to the municipalities. They thereby get the right to competition in rates among the carriers for this traffic. The carriers at present do not wish to compete in this partic-

> ular, but any order which prevents them from so doing whenever they may desire to operates directly to prejudice and destroy the municipal right which is recognized and preserved by section 22. (Record, p. 51.)

But the right of the state to receive preferential rates, if the carriers desire to grant them, is no right at all in the absence of a willingness by the carriers to give such rates.

Prior to the amendments of the Transportation Act, 1920, the purpose of the act to regulate commerce was to do away with unreasonable rates and with rates that discriminated against persons and localities. The statute as amended, however, has broader purposes. It is designed to develop an adequate transportation system for the people of the United States and to accomplish this purpose it imposes an affirmative duty on the Interstate Commerce Commission to fix rates which will produce a fair yield to the carriers upon the value of their properties. Congress intended that intrastate commerce should produce its just and proportionate share of the requisite revenue and to this end empowered the Interstate Commerce Commission to fix intrastate rates when it became necessary to do so in order to protect interstate commerce from a burden and discrimination resulting from inadequate, state imposed, intrastate rates. The purpose and scope of the Interstate Commerce Act as amended by the Transportation Act, is set forth in *Wisconsin R. R. Com.* v. *C. B. & Q. R. R. Co.*, 257 U. S., 563, 582, as follows:

The Interstate Commerce Act of 1887, 24 St. 379, was enacted by Congress to prevent interstate railroad carriers from charging unreasonable rates and from unjustly discriminating between persons and localities. * * * Whatever the causes, the fact was that the carrying capacity of the railroads did not thereafter develop proportionately with the growth of the country, and it became difficult for them to secure additional investment of capital on feasible terms. When the extraordinary demand for transportation arose in 1917, the Congress and the President concluded to take over all the railroads into the management of the Federal Government, and by joint use of facilities, which the Anti-trust Law was thought to forbid under private management, and by use of Government credit, to increase their effectiveness. This was done by appropriate legislation and executive action under the war power. From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the common carriers by steam railroad of the country were operated by the Federal Government. Due to the rapid rise in the prices of material and labor in 1918 and 1919, the expense of their operation had enormously increased by the time it was proposed to return the railroads to their owners. The owners insisted that their properties could not be turned back to them by the Government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit

and income. Congress acquiesced in this view. The Transportation Act of 1920 was the result. It was adopted after elaborate investigations by the Interstate Commerce Committees of the two Houses.

* * * * *

Under Title IV, amendments were made to the Interstate Commerce Act which included Section 13, paragraphs 3 and 4, and Section 15a, already quoted in the margin. The former for the first time authorizes the Commission to deal directly with intrastate rates where they are unduly discriminating against interstate commerce—a power already indirectly exercised as to persons and localities, with approval of this court in the *Shreveport* and other cases. The latter, the most novel and most important feature of the act, requires the Commission so to prescribe rates as to enable the carriers as a whole, or in groups selected by the Commission, to earn an aggregate annual net railway operating income equal to a fair return on the aggregate value of the railway property used in transportation. For two years the return is to be 5½ per cent, with ½ per cent for improvements, and thereafter is to be fixed by the Commission.

* * * * *

It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or dis-

criminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Section 15a to be one of the purposes of the bill.

Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent. of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a con-

> fers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission "in the exercise of its power to prescribe just and reasonable rates," i. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, Section 13, however, and find the Commission for the first time vested with a direct power to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it is impossible to escape the dovetail relation between that provision and the purpose of Section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an "undue, unreasonable, or unjust discrimination against interstate or foreign commerce," within the ordinary meaning of those words.

The construction which appellees put upon section 22 is clearly repugnant to the system of regulation provided by the Interstate Commerce Act, in that it would leave state authorities free to burden interstate commerce by requiring interstate carriers to transport government shipments within the state at inadequate and noncompensatory rates. The history of section 22 furnishes no foundation for a contention that Congress intended such a result.

The provision relative to reduced government rates must be interpreted in the light of the other provisions of the statute and in harmony with the general purposes of the statute.

In *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, in construing another provision of section 22, which reads:

> * * * and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies,

his court said at page 446:

> This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the Act.

The court held that, regardless of the proviso, a ipper could not maintain an action at common law a state court for excessive and unreasonable freight tes exacted on interstate shipments where the rates arged were those which had been lawfully fixed by e carrier according to the act, and had not been nd to be unreasonable by the Interstate Comree Commission.

Appellees say that discriminations must inevitably lt from the transportation, at reduced rates for Government, referred to in section 22. In *Dairy-'s Supply Co.* v. *P. R. R. Co.*, *supra*, the Interstate

Commerce Commission, speaking of such transportation, said:

> * * * The carriers may grant such transportation or deny it as they deem best, providing their practices in that respect do not result in unjust discrimination under section 2, or undue preference or prejudice under section 3, of the Act.

Assuming, however, that certain incidental discriminations will arise because of reduced municipal rates permitted by section 22, it certainly can not be said this section inevitably or naturally results in such systematic widespread discrimination against interstate commerce as results from the order of the Tennessee Commission.

There can be no doubt of the general authority of the Interstate Commerce Commission to fix interstate rates, including those applicable to transportation for the Government, and to fix intrastate rates also when this is necessary to remove a discrimination against interstate commerce. If the Commission's power in this respect is subject to the right of the railroad companies to transport Government shipments free, or at reduced rates, by virtue of section 22, the rates established by the Commission are, nevertheless, the lawful rates except in so far as the carriers may see fit to exercise the right which they have to carry for the Government at reduced rates.

THE ORDER OF THE INTERSTATE COMMERCE COMMISSION WILL NOT PRODUCE A DISCRIMINATION AGAINST MUNICIPAL INTRASTATE RATES.

It is argued that if the order of the Interstate Commerce Commission is permitted to stand, the result will be a discrimination against Government shipments within the State of Tennessee and in favor of Government shipments between points in Tennesse and points in other states, for the reason that the carriers, by virtue of section 22, are at liberty to charge less than their published interstate rates while their intrastate rates would be fixed by the order. The inconsistency of this contention with other contentions advanced by appellees is at once apparent. Furthermore, there is nothing in the order of the Interstate Commerce Commission which would prohibit the carriers from reducing their charges for intrastate government transportation to meet any reductions of corresponding charges for government transportation between points in Tennessee and points in other states. Attention is called to the following proviso in the order:

> * * * Provided, however, that nothing in this order shall be construed as requiring or authorizing any common carrier to * * * maintain any rate for the transportation of property in intrastate commerce which is greater than its corresponding rate contemporaneously in effect and applicable to the transportation of property in interstate commerce from, to, or at the same points. (Record, p. 40).

CONCLUSION.

The Tennessee Commission attempted to throw a part of the cost of road building, within the state, upon interstate commerce by requiring the railroads to maintain intrastate rates, applicable to the transportation of stone and gravel to be used in such road building, lower by 25 per cent than the rates applied on corresponding interstate transportation of the same commodities. The effect of its order is to favor and prefer localities within the state as against localities without the state and to require interstate carriers to perform transportation within the state at rates which will not produce their just share of revenue and which will therefore leave an undue and discriminatory burden to be borne by interstate commerce. The only rates involved in this case are rates on stone and gravel. But if the State authorities are free to burden interstate commerce by requiring carriers to maintain reduced intrastate municipal rates on these commodities, they are equally free to require carriers to maintain reduced intrastate municipal rates on all other commodities. Furthermore, they are free to require carriers to maintain reduced intrastate rates "for charitable purposes, or, to and from fairs and expositions for exhibits thereat," and for other purposes mentioned in section 22. The aggregate volume of this traffic is very large and the burden which the States may throw upon interstate commerce, if appellees' contention is sound, is a heavy one. The statute

places upon the Interstate Commerce Commission the duty to protect interstate commerce from burdens growing out of discriminatory, state imposed, intrastate rates. We submit that this Commission has authority to remove such a discrimination as was brought about by the order of the Tennessee Commission, and that the district court should have dismissed the bill of complaint.

J. CARTER FORT,
For Interstate Commerce Commission.
P. J. FARRELL,
Of Counsel.
MARCH, 1923.

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NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY ET AL. *v.* STATE OF TENNESSEE ET AL.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION *v.* STATE OF TENNESSEE ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

Nos. 396 and 429. Argued April 11, 12, 1923.—Decided May 21, 1923.

1. Section 22 of the Act to Regulate Commerce, as amended, in declaring that nothing in the act shall prevent the carriage of property free, or at reduced rates, for the United States, state or municipal governments, does not in effect deny to the Interstate Commerce Commission power to prohibit such reduced rates when they result

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[5] Compare *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U. S. 530; *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U. S. 264; *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516; *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171. Also *Connecticut Mutual Life Insurance Co.* v. *Spratley*, 172 U. S. 602; *Pennsylvania Lumbermen's Mutual Fire Insurance Co.* v. *Meyer*, 197 U. S. 407; *Old Wayne Mutual Life Association* v. *McDonough*, 204 U. S. 8; *Commercial Mutual Accident Co.* v. *Davis*, 213 U. S. 245; *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93.

in unjust discrimination or in undue prejudice to interstate commerce. P. 320.

2. The object of this section was to settle beyond doubt that the preferential treatment of certain classes of shippers and travelers in matters therein recited is not necessarily prohibited; it limits or defines the requirement of equality imposed in other sections of the act, and so preserves the right theretofore enjoyed by the carrier of granting preferential treatment to particular classes, in certain cases, and in this sense only is permissive; but it confers no right upon any shipper or traveler, nor any new right upon the carrier. P. 323.

3. The State of Tennessee authorized increases of intrastate freight rates to correspond with a level of interstate rates authorized by the Interstate Commerce Commission, but excluded rates on stone and gravel when for use in building public highways and consigned to federal, state, county and municipal authorities. The Interstate Commerce Commission, on complaint of a carrier, found that the exception produced illegal discrimination against interstate commerce and undue prejudice to persons and localities engaged in such commerce and ordered increase of the rates.

Held: (*a*) That the findings are conclusive, the evidence on which the Commission acted not having been introduced in this suit. P. 324.

(*b*) That the order was valid. *Id.*

284 Fed. 371, reversed.

APPEALS from a decree of the District Court declaring void, and enjoining the enforcement of, an order of the Interstate Commerce Commission. The State of Tennessee and its Railroad and Public Utilities Commission brought the suit against the United States, to have the order set aside. The Interstate Commerce Commission and three carriers affected intervened as defendants.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States.

Mr. J. Carter Fort, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

Mr. William H. Swiggart, Jr., with whom *Mr. Frank M. Thompson,* Attorney General of the State of Tennessee, was on the brief, for appellees.

Mr. Fitzgerald Hall, with whom *Mr. John Bell Keeble* and *Mr. Charles N. Burch* were on the brief, for appellant carriers.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Section 22 of the Act to Regulate Commerce, as amended by Act of March 2, 1889, c. 382, § 9, 25 Stat. 855, 862, provides, among other things,

"That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, . . ."[1]

Whether this section should be construed as denying to the Interstate Commerce Commission power to prohibit such reduced rates, even where they result in unjust discrimination or in undue prejudice to interstate commerce is the main question for decision.

On July 29, 1920, the Interstate Commerce Commission authorized a general increase, throughout southern territory, of 25 per cent. in interstate freight rates. *Ex parte 74, Increased Rates, 1920*, 58 I. C. C. 220. Thereafter, the Railroad and Public Utilities Commission of Tennessee authorized, for that State, a like increase of intrastate rates. But the following articles (among others) were excluded from this increase: Carload shipments of stone and gravel when for use in building public highways and consigned to federal, state, county and municipal authorities or their *bona fide* agents. To remove the exception, carriers applied to the Interstate Commerce Commission, claiming that the exception produced illegal discrimination against interstate commerce and an undue prejudice

[1] The first line of § 22 as originally enacted, 24 Stat. 379, 387, read, "That nothing in this act shall apply to the carriage," etc.

to persons and localities engaged in such commerce. The Commission found such discrimination; and ordered that the intrastate rates on these commodities, also, be increased to the level of the interstate rates. *Tennessee Rates and Charges*, 63 I. C. C. 160, 172. On October 21, 1921, the State of Tennessee and its commission brought, in the federal court for the Middle District of Tennessee, this suit against the United States to have the order set aside. The Interstate Commerce Commission, the Nash ville, Chattanooga & St. Louis Railway and two other interstate carriers, intervened as defendants. The case was heard by three judges under the Act of October 22, 1913, c. 32, 38 Stat. 208, 219. A final decree was entered, declaring the order void, and enjoining its enforcement. 284 Fed. 371. The case is here on two appeals. No. 396 is that of the carriers; No. 429, that of the United States and the Interstate Commerce Commission.

Railroad Commission of Wisconsin v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, had been decided by this Court before entry of the judgment appealed from. But the District Court considered that case inapplicable; and held that, by reason of § 22, the Interstate Commerce Commission is "without jurisdiction to forbid the railroads from carrying freight for the public at a less price than it charges individuals for the same carriage of the same freight;" that the section "excludes this particular traffic from the rate structure which the Commission is authorized to erect and control in still other words, there is freedom of discrimination."

The argument is, in substance, this: An order of the Interstate Commerce Commission increasing intrastate rates to the level of interstate rates, must rest upon a finding of illegal preference resulting from the relation of intrastate to interstate rates. Preference to governmental shippers is expressly permitted by § 22 of the act. Hence, a grant of such preference cannot be held to be unjust or

unreasonable under §§ 2 and 3. There was no finding that these lower intrastate rates resulted in failure of the intrastate traffic to yield its proper share of the earnings of the carriers. Consequently, the order of the Commission is void.[2] The argument is, in our opinion, unsound.

Every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by §§ 2 and 3) only that discrimination which is unreasonable, undue, or unjust. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 219, 220; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481. Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case. *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 170. The Commission may conclude that the preference given is not unreasonable, undue or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity or class of traffic. On the other hand, preferential treatment of a class, ordinarily harmless, may become undue, because, under the special circumstances, it results in prejudice, or disadvantage to some other person, commodity, or locality, or to interstate commerce.

[2] The order of the Interstate Commerce Commission was declared void "to the extent that the rates therein ordered to be established . . . apply to such transportation, for the United States, State or Municipal governments, of stone and gravel, the title to which has passed to the government or is vested in it at the point of the origin of its transportation."

Section 22 must in this matter, as in others, be read in connection with the rest of the act, and be interpreted with due regard to its manifest purpose. *Robinson* v. *Baltimore & Ohio R. R. Co.*, 222 U. S. 506, 511.[3] Congress did not intend, by this provision concerning reduced rates and free transportation, to create an instrument, by which the carrier was authorized, in its discretion, to subject interstate commerce to undue prejudice, or by which the State was empowered to compel the carriers so to do. The object of the section was to settle, beyond doubt, that the preferential treatment of certain classes of shippers and travelers, in the matters therein recited is not necessarily prohibited. And in this respect its provisions are illustrative, not exclusive. It limits, or defines, the requirement of equality in treatment which is imposed in other sections of the act. By so doing, it preserves the right of the carrier theretofore enjoyed of granting, in its discretion, preferential treatment to particular classes in certain cases. Only in this sense can it be said that the section is permissive. It confers no right upon any shipper or traveler. Nor does it confer any new right upon the carrier.

The grant of a lower rate on road material to a government, engaged in highway construction, may benefit the government without subjecting to prejudice any person, locality or class of traffic. But a lower rate may result in giving to a single quarry within the State all of the governmental business, so that competing quarries and localities within or without the State, or interstate traffic, would be prejudiced. That such undue discrimination does, and will, result from the order of the Tennessee commission was expressly found by the Interstate Com-

[3] See also *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 446; *Pennsylvania R. R. Co.* v. *Puritan Coal Mining Co.*, 237 U. S. 121, 129, 130; *Illinois Central R. R. Co.* v. *Mulberry Hill Coal Co.*, 238 U. S. 275, 282.

merce Commission. Its findings are necessarily conclusive, since the evidence on which it acted was not introduced in this suit. *Louisiana & Pine Bluff Ry. Co.* v. *United States*, 257 U. S. 114.

There is nothing in *Interstate Commerce Commission* v. *Baltimore & Ohio R. R. Co.*, 145 U. S. 263, 278; *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*, 173 U. S. 684, or *Pennsylvania R. R. Co.* v. *Towers*, 245 U. S. 6, inconsistent with the views expressed above. The decisions made by the Interstate Commerce Commission are in substantial harmony with them.[4]

Reversed.

MR. JUSTICE SANFORD took no part in the consideration or decision of these cases.

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[4] Section 22 has been construed by the Commission as conferring upon carriers such permission to furnish transportation at reduced rates or free, in certain cases; as not conferring upon any shipper or traveler a right to such transportation; and, ordinarily, as not conferring upon the Commission power to establish such exceptions to the normal rates and fares. *Sprigg* v. *Baltimore & Ohio R. R. Co.*, 8 I. C. C. 443; *Field* v. *Southern Ry. Co.*, 13 I. C. C. 298; *Metropolitan Paving Brick Co.* v. *Ann Arbor R. R. Co.*, 17 I. C. C. 197, 204; *Eschner* v. *Pennsylvania R. R. Co.*, 18 I. C. C. 60, 63; *Dairymen's Supply Co.* v. *Pennsylvania R. R. Co.*, 28 I. C. C. 406; *United States* v. *Union Pacific R. R. Co.*, 28 I. C. C. 518, 524. See also *C. B. Havens & Co.* v. *Chicago & Northwestern Ry. Co.*, 20 I. C. C. 156. Compare *Cator* v. *Southern Pacific Co.*, 6 I. C. C. 113; *Commutation Rate Case*, 21 I. C. C. 428, 437; *United States* v. *Alabama & Vicksburg Ry. Co.*, 40 I. C. C. 405. Conference rulings provide, as to some reduced rates under § 22, that they must be filed and posted with the Commission; and as to others that they need not be. See Conference Rulings, Issued Nov. 1, 1917, Nos. 33, 36, 208e, 218, 244, 311, 452.